UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

- -x

In the Matter of:

DPH HOLDINGS CORP., ET AL.,

Debtor.

- -x

United States Bankruptcy Court

300 Quarropas Street

White Plains, New York

September 24, 2010

10:22 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Hearing re Notice of Hearing Proposed Fifty-Ninth Omnibus Hearing Agenda filed by John Wm. Butler, Jr. on behalf of DPH Holdings Corp., et al.

Hearing re Proposed Thirty-Seventh Claims Hearing Agenda filed by John Wm. Butler, Jr. on behalf of DPH Holdings Corp., et al.

Transcribed by: Sara Davis

A P P E A R A N C E S :

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Attorneys for the Reorganized Debtors
155 North Wacker Drive
Chicago, IL 60606

BY: KENNETH BERLIN, ESQ.
JOHN K. LYONS, ESQ.
ALBERT L. HOGAN III, ESQ. (TELEPHONICALLY)

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Attorneys for Illinois Tool Works and ITW Food Equipment Group
30 Jelliff Lane
Southport, CT 06890-1436

BY: KRISTIN B. MAYHEW, ESQ.

U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE U.S. TRUSTEE
32 Whitehall Street, 21st Floor
New York, NY 10004

BY: GREG M. ZIPES, ESQ.

KRIEG DEVAULT
Attorney for ERISA for the VEBA Committee
One Indiana Square
Suite 2800
Indianapolis, IN 46204-2079

BY: PATRICIA L. BEATY, ESQ.

SATTERLEE STEPHENS BURKE & BURKE, LLP
Attorney for Board of Trustees overseeing the Delphi
Salaries Retirees Association Benefit Trust
230 Park Avenue
New York, NY 10169

BY: TIMOTHY T. BROCK, ESQ.

FARELLA BRAUN & MARTEL LLP
Attorneys for Official Committee of Eligible Salaried
Retirees
235 Montgomery Street
17th Floor
San Francisco, CA 94104

BY: DEAN M. GLOSTER, ESQ. (TELEPHONICALLY)

KASARDA LAW

Attorney for the State of David Lyons

445 Hamilton Avenue

White Plains, New York 10601

BY: STEVEN KASARDA, ESQ.

ALSO APPEARING:

JAMES A. LUECKE, PRO SE (TELEPHONICALLY)

BRIAN L. PENLEY, PRO SE (TELEPHONICALLY)

P R O C E E D I N G S

MR. LYONS: Good morning, Your Honor. John Lyons on behalf of the reorganized debtors.

THE COURT: Good morning.

MR. LYONS: Your Honor, we have an omnibus hearing, as well as a claims hearing. So with Your Honor's permission, I'll proceed with the omnibus hearing first.

THE COURT: That's fine. Let me just get a little organized here.

THE CLERK: I'm sorry, your name?

MR. LYONS: John Lyons.

THE COURT: Okay. All set.

MR. LYONS: Okay. Your Honor, turning to the agenda that we previously filed with the Court for the fifty-ninth omnibus hearing, we have a number of matters.

Your Honor, the first matter is the -- an adjourned matter, Weevel Tool Works (ph), that hearing has been adjourned to the October 21st, omnibus hearing.

THE COURT: Okay.

MR. LYONS: The next matter is item number two, the motion to close Chapter 11 cases of 20 filing debtors.

Your Honor, we're at the point in the cases where we can actually start to close some of them. All the factors, as laid out in our papers, we believe have been met. We do, however -- we're in the process of filing notice of dismissal

of certain of the avoidance actions that were unpreserved under the plan, and that should be done by the end of the day today. Once that is completed, we've proposed to hand to -- to give Your Honor closing the 20 cases.

THE COURT: Okay. I saw no opposition to this motion. If there are going to be any changes to the proposed order, I'd just ask that you cc the U.S. Trustee on the e-mail to chambers, but it's appropriate that the cases be granted -- I'm sorry, that the motion be granted and the cases be dismissed.

MR. LYONS: Very good, Your Honor.

THE COURT: Or closed.

MR. LYONS: We will do so.

THE COURT: Okay.

MR. LYONS: The next item on the agenda is item number three. It's the VEBA Committee motions for order. The debtors did file a pleading and my partner, Al Hogan is on the line to address any concerns Your Honor may have vis-a-vie the reorganized debtors.

THE COURT: Okay. Thank you.

MR. BROCK: Good morning, Your Honor. I'm Timothy Brock of Satterlee Stephens Burke & Burke, on behalf of six individuals who are the Board of Trustees overseeing the Delphi Salaries Retirees Association Benefit Trust. They are ERISA fiduciaries, and they collectively refer to themselves as the VEBA Committee.

The resumes of this group are attached as Exhibit A to the limited objection, also filed by the VEBA committee. Four of those six individuals are here today in the courtroom. They are Mr. James Baker, Dr. MaryAnn Baker, Mr. Joseph McQue (ph), and Mr. Vincent Wilson. Two other members, Dan Black and Carol Harveylight (ph) are unable to be here today.

But, Your Honor, the enormous success of the Delphi VEBA Trust thus far is largely, if not exclusively, the result of the tireless efforts of this dedicated resourceful and highly educated group.

Also with me today is Patricia Beaty, the Indianapolis based attorney who represents this VEBA Committee with regard to all ERISA compliance matters, as well as internal governance matters. Ms. Beaty has a pending motion for pro hac admission before this Court, and I would like to ask that she be permitted to address the Court today if circumstances warrant, that is, if issues relating to governance or ERISA arise and require some response from the VEBA Committee.

THE COURT: That's fine.

MR. BROCK: Ms. Beatty is also sworn an affidavit in support of the VEBA Committee's limited objection. That was filed late last night, Your Honor. We've delivered a copy to chambers, and I've made copies available to the parties here in the courtroom.

Your Honor, we saw two pleadings that are on the

agenda for today. One is the motion of the VEBA Committee to compel the Section 1114 committee to file it's final report with the Court, pursuant to the terms of the settlement order. And secondly, to direct the office of the United States Trustee to disband the Section 1114 committee.

The other pleading is the limited objection of the VEBA Committee to the final report of the Section 1114 committee.

Obviously, a portion of our original motion to compel, which was filed on July 23rd, was rendered moot by the filing by the 1114 committee of its final report approximately 30 days later on August 20th. Yet, the final report raised certain concerns and requested certain relief, mainly more delay.

The VEBA committee felt strongly that there needed to be a limited objection filed because the final report disingenuously characterizes the 1114 committee's demands as related to basic protections that can be quickly implemented after a brief negotiation.

Not so, says my client, the court demand laid bear is to reinstate certain individuals, Mr. Frost and others, who were once on the VEBA Committee but who have -- are no longer on the committee. And it -- we interpret this as a request to perpetuate the turmoil that these individuals incited while they were on the VEBA Committee.

Negotiations have occurred. The Gloster declaration

on file with this court recounts those negotiations, mostly accurately. We're simply at an impasse, thus in the limited objection, we sought to convince this court that the only thing genuinely necessary now for these -- from these proceedings, is a formal official dissolution of the Section 1114 committee.

We sought to convince the Court of this by adding some relevant transparency on only certain of the disputes that have been ongoing, and which frankly, just need to cease.

First, we explained in our pleading, in our limited objection, how the VEBA Committee is presently composed, and we did so by presenting a chronology of its membership composition, and each of the events were the composition and size of the board of trustees has changed.

Second, we detailed the -- and, Your Honor, I might add that presently of the six members of the VEBA Committee, one person who has been vetted with the 1114 committee is -- we still haven't heard from the 1114 committee, but the other five members were either the original VEBA Committee appointed by the Section 1114 committee, or they were subsequently approved by that committee.

So secondly, Your Honor, we've detailed numerous accomplishments of the VEBA Committee so as to dispel any inaccurate impression the Court may derive from this, as to whether the VEBA's Committee -- the VEBA Committee's work is getting accomplished. And this is not in dispute.

I would note that even the Gloster -- I should say the 1114 papers submitted yesterday admit that quote, there is no question that the health prescription drug, vision care, and dental benefit programs provided through the VEBA have been a tremendous success, of which everyone should be justifiable proud, unquote.

Third, we sought to shed light on certain of the actual ongoing activities of the 1114 committee. The activities that my clients submit are manifestly wrongful and possibly actionable.

To keep our pleadings simple and straight forward, we focused on only two points that tend to show the workings of the 1114 committee and we discussed -- we therefore discussed the Cone Insurance (ph) disputes, and we discussed the 1114 committee's demand for a 50,000 dollar payment before it would file the final report. That payment was allegedly to fund a retainer for counsel.

I prefer to say little about the Cone Insurance dispute, frankly. Suffice it to say that the VEBA Committee has been repeatedly told by the Section 1114 committee that it is saddled with an agreement with Cone Insurance, due to a Frost-Cone letter that was promulgated before the VEBA Committee was -- had been formed, and while Mr. Frost was the chair of the 1114 committee.

And it occurs to me, Your Honor, that perhaps all that

really needs to be said about the Cone Insurance dispute now is contained in paragraph number nine of the declaration of Dean Gloster, which he filed yesterday.

In that paragraph, Mr. Gloster admits that his firm has quote, a substantial shared economic interest with Cone Insurance Group, where our firm is only compensated if those health benefit programs are actually successfully rolled on. Accordingly, we would have a potential conflict of interest in any litigation involving Cone Insurance Group, unquote.

And then in the footnote number six to the 1114 reply, to our limited objection, Mr. Gloster goes further to admit that he would have a potential conflict of interest in any dispute affecting Cone Insurance Group.

Well, Your Honor, the VEBA Committee is in an ongoing dispute with Cone Insurance and has been for some time. The VEBA Committee has encountered aggressive tactics by the 1114 committee, represented by Mr. Gloster in defending Cone Insurance and the interests of that firm, all at the expense of the VEBA Trust.

Now, while the VEBA Committee does work with Cone Insurance, it must do so with the heightened state of vigilance, as the details of that firm's obligations to the VEBA Trust are vague at best, while the alleged obligations of the VEBA Trust to Cone Insurance are undesirable and of over-long duration.

Why are they undesirable? Well --

THE COURT: You don't need to get into this, all right.

MR. BROCK: Thank you.

THE COURT: In my mind, this whole dispute which frankly was not raised in your motion, which has colored my whole view of this, since your original motion, really didn't deal, as far as I'm concerned, with why your group is seeking this relief, which puts you behind the eight ball, is about the control of the board.

And so I have one question for you, which is whether the VEBA Committee or the board is prepared to have some form of election of replacement board members on notice to the beneficiaries, so that if there is some problem, that is perceived by a majority of the beneficiaries with how the trust is conducting itself, in addition to their right to sue under ERISA. They can simply replace the board.

Are your members prepared to accept that?

MR. BROCK: Well, Your Honor, not surprisingly, we haven't discussed that.

THE COURT: Well, maybe you should. Because right now, I'm not prepared to grant your relief. I'm troubled by the notion that two sets of fiduciaries are squabbling and it is not -- that squabble, until last night, has really not been made evident to the actual beneficiaries, the retirees who you

all represent. Okay? And I'm concerned, particularly given the fact that you weren't even prepared to outline the issue to me when you made the motion that someone is hiding the ball.

In my mind, the only way to deal with that is to make sure that in the future, those who are the beneficiaries of this trust, can replace the board if the board isn't acting properly by a majority vote. Not by some cabal on one committee or some cabal on another committee, but in sunshine.

MR. GLOSTER: Thank you, Your Honor. This is Dean Gloster representing the Official Committee of Eligible Salaries Retirees appointed by this Court through Section 1114. And frankly, that's all we want.

THE COURT: Okay.

MR. GLOSTER: We want --

THE COURT: All right. So I'm going to adjourn this motion until the next omnibus day. If there's something about ERISA that is violated by such a provision or if somehow you believe that this will impair the operation of the board as a proper ERISA fiduciary, I'd like to hear about it, but frankly, I've reviewed the agreement that set up this trust, and the way it's drafted, and I think this is appropriate, given how this whole matter started, is that the 1114 committee has the right, I believe, to choose the board and replace the board. And I supervise that committee through the U.S. Trustee.

If that committee is not doing its job, they can be

replaced. But this is all, I think, a short -- a long-headed way of my short response, which is that, as far as my responsibilities to these retirees, to these beneficiaries, I want to make sure that their fiduciaries are acting in their best interests.

I'm not prepared to leave it up to ERISA litigation. This is not an ERISA trust that was established by some company on its own. It was established through this Court's processes, on notice to these beneficiaries. And in part, because I suggested to the company that notwithstanding what I believe to be the company's legal rights, it negotiate to permit the committee to be formed and to settle.

And so I feel that I have some stake in making sure that the beneficiaries are getting the best representation they can, to ensure that beyond this trust agreement, I believe you need to have some voting process by the beneficiaries, so that the trustees are accountable to them by vote.

There are enough of them here so that you're not going to get some parochial interest to sway the vote. And I'm concerned given the history of this motion that someone on either side may be acting parochially, and I don't want that to happen.

I -- it seems appropriate to me that you could have a staggered board, because you don't want to lose the expertise of people, necessarily, but it shouldn't be super-staggered.

The beneficiaries should have a say on their rights. Okay. So I'm going to adjourn this for a month or to the next omnibus day.

MR. BROCK: Thank you, Your Honor.

MR. GLOSTER: Thank you, Your Honor.

THE COURT: If there are any eminent decisions that the board needs to make in the meantime, they should feel free to make them as fiduciaries under ERISA. All I'm focusing on is some form of beneficiary governance here.

MR. GLOSTER: Your Honor, we also requested that the trustees agree to a cap on future trustee compensation, because this time has actually --

THE COURT: Well, I'm not prepared to insist on that as a condition to keeping your committee in -- or not keep your committee in place. It seems to me that that's the type of thing that under ERISA, the law is pretty clear, and they can, you know -- if they -- and the trust agreement is clear on the purposes the way the money can be allocated.

So if someone is paying themselves an improper amount, they're going to suffer for it.

MR. GLOSTER: And frankly, Your Honor, at your suggestion, they agreed to comply with future voting, does put a check on unreasonable compensation as well.

THE COURT: Right. Okay.

MR. GLOSTER: Your Honor, since opposing counsel had

made reference to a conflict of interest --

THE COURT: I don't --

MR. GLOSTER: -- do you want me to address that briefly?

THE COURT: -- need -- I stopped counsel because I really view that as extraneous here. I'm not going to decide that issue. I don't think it's appropriate for me to decide it and I'm not going to get into the issues as to how the board has been functioning, and how the committee's been functioning, and how the professionals have been functioning. I don't think that's appropriate under my prior orders or frankly under my jurisdiction.

MR. GLOSTER: Sure. Although I did want to note that--

THE COURT: I just want to make sure that there's appropriate check on the board, and frankly, that check probably goes beyond the requirements under ERISA. But under the circumstances here, where there's no company to pursue it, and no company that acts as a trustee along with professionals, I think that you need to basically revise the trust agreement to reflect that it shouldn't be the board just perpetuating itself subject to someone's right to take discovery and sue them. I just don't think that's appropriate under these circumstances.

MR. GLOSTER: I agree, Your Honor, and I would expect

that we could very quickly modify the trust agreement and have the 1114 committee in a position to be disbanded at the next omnibus hearing.

THE COURT: Okay.

MR. GLOSTER: I just do want to note, I do not have a financial interest in any compensation given to the Cone Insurance Group with respect to this matter and --

THE COURT: Right. And that's what you stated and I accept that. Okay. Anything else?

MS. BEATY: May I speak?

THE COURT: Yes.

MS. BEATY: I'm Patricia Beaty. I am ERISA counsel for the VEBA Committee and I just wanted to point out that during our negotiations with the 1114 committee, we did talk about having term limits and the beneficiaries voting on members, so that's not something we're opposed to.

THE COURT: Okay.

MS. BEATY: But it just didn't work out that way. So we will --

THE COURT: All right.

MS. BEATY: -- go back and look at that issue. And I also wanted to speak about the compensation issue, but you're absolutely correct in what you said --

THE COURT: All right.

MS. BEATY: -- so I don't need to now.

THE COURT: Okay. Very well.

MS. BEATY: Thank you.

MR. GLOSTER: Thank you, Your Honor.

THE COURT: Okay. So again, this matter will be adjourned to the next omnibus hearing date. I would ask you if you do reach agreement, to notify the U.S. Trustee. It may be that there's -- you may want to memorialize your agreement on the record, but I think the U.S. Trustee should be in a position to disband the committee, and you should keep Mr. Zipes in the loop once you've reached agreement.

MR. ZIPES: Judge, Greg Zipes with the U.S. Trustee's. I'll review with my office, it may be that we would need an order from you directing us, but I'm just --

THE COURT: Oh, I expect the parties will want something on the record. I just want to make sure that we don't have to wait further, so that --

MR. ZIPES: Yes, sir.

THE COURT: -- you all would have to do your work too at the last minute. So if you could just tell the U.S. Trustee or keep the U.S. Trustee up to speed as you move along on this one point.

MR. BROCKS: Thanks, Judge.

THE COURT: Okay.

MR. ZIPES: Thank you.

THE COURT: Okay.

MR. LYONS: Your Honor, back to the omnibus agenda. That is it for the omnibus agenda. We have no further matters.

THE COURT: Okay.

MR. LYONS: So we'll turn to the claims hearing agenda, the thirty-seventh claims hearing agenda. We have a number of matters ranging from larger in scope to smaller in scope and we'll proceed, hopefully expeditiously.

THE COURT: Okay.

MR. LYONS: I'll skip over the adjourned matter. Item number two on the claims agenda, which Your Honor has, is the motion for leave to file late claim Best Foam (ph).

Your Honor, this is a matter covered by the late claims protocol, where they filed a late claim, we sent a notice that they had to file a motion for leave to file a late claim, or the Court would expunge the claim. The deadline was September 14th, and Best Foam has not filed a motion for leave to file a late claim, so we'd ask that the Court enter an order expunging that claim.

THE COURT: All right. I -- and again, you have -- you provided Best Foam with that order or those procedures?

MR. LYONS: Correct.

THE COURT: So in light of that, I'll grant the relief on the basis that it's unopposed, and you can submit an order on that.

MR. LYONS: Okay. And just for the record, the notice

of that deadline is Docket No. 20513.

THE COURT: Okay. Very well.

MR. LYONS: The next item is the claims objection regarding the Claimant, Steven Streeter. That matter has been settled and we did submit a joint stipulation resolving that matter.

THE COURT: Okay. Very well.

MR. LYONS: Similarly with item number four, the claim of Census Precision Dye Casting, that matter as well has been settled by stipulation, and that is, I believe, been filed with the Court as well.

THE COURT: All right.

MR. LYONS: The next item, item number five is the claim objection regarding the claim of Dennis Dashkavince (ph). Your Honor, this is a claim for worker's compensation that was actually transferred to General Motors pursuant to the terms of the modified plan.

THE COURT: This is a plan of the MDA that then approved the plan?

MR. LYONS: Correct.

THE COURT: Approved by the plan.

MR. LYONS: More precisely that's correct.

THE COURT: Okay. All right.

MR. LYONS: And that liability has been transferred to GM. We have received no response to our papers, so again, we'd

ask that that claim be expunged.

THE COURT: All right. I will grant that -- well, let me -- is Mr. Dashkavince or his counsel is not on the phone, right? Okay. And he's not here. I'll grant that objection, as I've said on some of these in the past. It's my belief that if for some reason GM disavows the obligation for good reason, and I know of no good reason, but if it does do so for good reason and it's concluded that, in fact, it doesn't have the obligation, the creditor or the claimant has 502(j) at its disposal to seek reconsideration.

But based on my understanding of the MDA, the objection is valid and there doesn't need to be anything in order reciting that. It's just my belief that it's the best way to handle these things, if in fact, GM somehow shows in the future that it's not viable.

MR. LYONS: Very good. And actually in the present form of the order, we do mention that is the subject of 502(j), Your Honor.

THE COURT: All right. Well, that's fine, without any lengthy -- it's just a clause there and that's fine.

MR. LYONS: Okay. Very good. Item number six is the claim or in the claim of estate of David Lyons.

THE COURT: No relation?

MR. LYONS: No relation, Your Honor.

THE COURT: Okay.

MR. LYONS: There are a lot of us out there. Your Honor, we do have counsel here in court and counsel, along with us, have decided that they would just withdraw the claim --

THE COURT: Okay.

MR. LYONS: -- subject to Ms. Lyons' rights vis-à-vis the State of Ohio for the guaranty association in essence and Ohio's payment of that claim.

THE COURT: All right. Is that right, sir?

MR. KASARDA: Yes, it is.

THE COURT: Okay. And have you given your name to the operator before then, the ecro operator?

MR. KASARDA: I have not.

THE COURT: Okay. If you could just state for the record who you are.

MR. KASARDA: Yes. My name is Steven C. Kasarda, P.C.

THE COURT: C-a --

MR. KASARDA: K-a-s-a-r-d-a.

THE COURT: Okay. Thank you. All right. So are you going to submit an order on that or will --

MR. LYONS: Yes. We'll submit an order withdrawing the claims subject to rights --

THE COURT: Okay.

MR. LYONS: -- and we'll settle the order with counsel.

THE COURT: Fine.

MR. KASARDA: Thank you.

THE COURT: That's fine.

MR. LYONS: Item number seven on the agenda is the claim regarding the claim of Robert Stacek (ph). This is similar to the earlier claim. Mr. Stacek has a worker's compensation claim in New Jersey.

As Your Honor may recall in our hearing regarding the New Jersey worker's comp, the debtors are over-collateralized on account of the pre-petition claims. They have a bond and the collateral, as well in excess of any kind of run-out for the pre-petition claim. So accordingly, because the claim is going to be paid by the State of New Jersey with the existing collateral, we would seek that the claim be expunged, subject, of course, to the 502(j) rights.

THE COURT: Okay. There's no one here on behalf of Mr. Stacek? No one on the phone on his behalf?

All right. I think that the administrative claim should be expunged with prejudice. It's not an administrative claim. The claim as a pre-petition claim should be expunged again with the clause, with reference to 502(j).

MR. LYONS: Okay. Very good, Your Honor.

Item number eight is the claim objection regarding the claim of Kerry Roe, R-o-e. This again is a claim filed as a worker's compensation claim filed as an administrative claim. From the face of the documents that Mr. Roe filed, the injury

occurred pre-petition, and under the old Nicole (ph) decision that Judge Lifland decided, it's clear that for purposes of determining when a claim accrues, that you look at the date of injury for a worker's compensation claim, because it occurred pre-petition, there's no basis for it to be an administrative claim.

THE COURT: Right. Is anyone on the phone on behalf of Mr. Roe? On behalf of Terry Roe?

All right. I've reviewed the objection and the underlying claim. It does, in fact, appear to me to be a pre-petition claim, not an administrative expense claim, and therefore, it should be disallowed as such and expunged.

I -- under the -- I mean, it's a late claim as a pre-petition claim, so it should be expunged as a late claim under the Court's bar date order.

MR. LYONS: Very good, Your Honor. Item nine, the claim objection regarding the claim of Brian Lee Penley, and I believe Mr. Penley is on the line.

Your Honor, we do lay out the basis for our objection. The claim relates to a claim for tools that were apparently allegedly lost at Delphi and Mr. Penley has asserted that there's a conversion claim against Delphi, since the tools were not returned.

This all occurred, no question, pre-petition. He asserted a priority claim and certainly there's no basis in our

view for, you know, any priority basis for this claim to begin with. And also, settlement was reached with the UAW over this grievance, which did cover, in our view, this claim for lost tools. Mr. Penley did cash the check pursuant to that settlement, although he did preserve his rights to pursue an appeal of the grievance, which was settled, and which was pursued to no avail to Mr. Penley.

So we believe for all those reasons, the claim should be expunged.

THE COURT: Okay. Mr. Penley?

MR. PENLEY: Yes, Your Honor.

THE COURT: I guess I had two questions in connection with this matter. The first one was it didn't -- I didn't see a basis for saying that the settlement was comprehensive. It looks from the face of the settlement that it's intended to resolve all claims. What is you response to that?

MR. PENLEY: Yes?

THE COURT: What is your response to that language?

MR. PENLEY: The union, the UAW and management has always taken the position that a grievance settlement for all issues refers to that grievance only.

Now, Delphi's attorneys submitted all these other documents, but they forgot to submit the most important one, which was the original grievance that was filed and settled. And that was for lost wages. It was not for lost tools.

THE COURT: Well, where is the original grievance?

MR. PENLEY: Delphi's attorneys chose not to file that.

THE COURT: No, but I --

MR. PENLEY: Oh.

THE COURT: You haven't filed it either, right?

MR. PENLEY: No. I have not filed it either. I don't believe I've ever received a copy of it. I know it was filed and written when I was represented by the UAW, by the committeemen, I seen how it was written, but I never received a copy of it.

THE COURT: And was that the grievance that was taken up on appeal?

MR. PENLEY: Taken up? Yes.

THE COURT: And --

MR. PENLEY: I apologize for that.

THE COURT: So if it --

MR. PENLEY: It was a lot longer -- I was off a lot longer than that, and I felt more wages should be due to me, but that's what the UAW settled for.

THE COURT: And but you say that grievance that was taken up on appeal, was just for lost wages?

MR. PENLEY: Yes. They actually did not realize my tool box was missing until after the agreement was reached in April.

THE COURT: Okay. And then --

MR. PENLEY: And didn't realize my tool box was missing until some time in May --

THE COURT: All right.

MR. PENLEY: -- when they started looking for it.

THE COURT: The second point is on the tool box, I have a declaration that says that, along with the check, the tools were returned to you, and I believe you acknowledged that you didn't open the package, but sent it back?

MR. PENLEY: That's a totally separate matter. That was settled, and I did not -- you know, I accepted the settlement on that. I worked in the factory.

THE COURT: But wasn't -- but I guess the -- if the claim is for tools and they sent it to you and you returned the tools, why would you still have a claim for tools?

MR. PENLEY: They were not the same tools. That's what I was getting ready to explain, Your Honor.

THE COURT: Okay. But I think didn't you say you didn't open up the package, you just sent it back?

MR. PENLEY: Yes. I didn't accept delivery of that package. It was a small cardboard box. It had contents of my workbench that I worked on -- worked out of on the floor. My toolbox with my roll-around and tools was kept in the actual shop area. The two items are totally separate.

THE COURT: Well, how would you know what was inside

the package and that it wasn't your tools?

MR. PENLEY: Because my tools weigh about 800 pounds and this is about a 20 pound package.

THE COURT: Okay. All right. That's a pretty good answer. Okay. Let me hear from the debtors on the first point and the second point.

MR. LYONS: You Honor, I think it's clear the settlement agreement, and this has been confirmed with Mr. Penley, it included, and I quote, the settlement agreement, which settles all grievances or issues, including financial claims for missing personal items are considered settled between the parties.

When the debtors sent the check to Mr. Penley, pursuant to the settlement agreement, Mr. Penley had a question, well, you know, I want to make sure my -- that my rights to appeal the grievance are preserved. Delphi wrote back and this is all on the record, Your Honor, and you have the correspondence.

It reiterated the debtor's position that this did settle claims for all missing personal items that Mr. Penley had. And, Your Honor, the fact that -- it's a little bit at odds with what Mr. Penley is saying right now. He did send a letter to this Court October 26th, 2005 where he goes through this whole dispute, and it was clear that the issue regarding the tools was actually before the parties in April of 2004,

which was the date of the settlement agreement. And that is attached to the proof of claim. And, Your Honor, I can --

THE COURT: Can you hand that up?

MR. LYONS: -- refer that to you. Yes.

THE COURT: Would you have a copy?

MR. LYONS: I'll just rip it out of my book right now, but it is in the record.

THE COURT: Okay. And you have the settlement agreement there too. I just want to take one last look at that.

MR. LYONS: Sure.

THE COURT: Thank you.

(Pause)

MR. LYONS: And again, Your Honor, the letter dated October 27th was attached to Mr. Penley's proof of claim which is number 350, claims number 350.

THE COURT: Okay.

MR. LYONS: So, you know, the basic purpose of referring Your Honor to that letter is it clearly was contemplated and, you know, the parties were cognizant that this claim for missing tools was an issue in April 2004, which adds, you know, further precision to the settlement agreement that was signed by the UAW, which covered financial claims for missing personal items.

So it's the debtor's view that this was covered by the

release, and therefore, when the agreement was signed, as the UAW had the authority to resolve grievances on behalf of Mr. Penley that that fully resolved his claim for missing tools.

THE COURT: Okay. Mr. Penley, the letter does say that in October of 2003, there was a problem at work, and I was suspended and prevented by management from retrieving my personal tools, which is well before the April 29th, '04 date of the settlement. So it does appear to me that the settlement covers this.

MR. PENLEY: Your Honor?

THE COURT: Yes.

MR. PENLEY: At that time, when that was taking place, I had every faith that the union would negotiate to bring me back. I was at the time, the reason I was discharged, was right before Halloween, we were in a jobs bank, we reported to work, and just sat around all day, and I had wore fuzzy slippers to be comfortable and a bathrobe to stay warm, because they kept the room about 60 some degrees. A lot of other people were doing it but management sent me home, and that was the reason I was discharged.

So I had every faith that I'd be reinstated. So at that point, it wasn't that big a deal. My tools were in the tool room, I thought they were safe. I thought I would still be coming back to work. So I did not pursue it at that time.

The only time I started pursuing my tool box was when

I accepted a transfer to another -- back to GM, which is like working -- it was a totally separate company, but I had rights to go back to GM, and I went back to GM. So at that point, my tools were not an issue. I thought they were safe. I didn't -- you know, as far as the tools they sent, they were returned, and they lost them, and I received a settlement for that, based on what they had as inventory, and I accepted that.

But as far as the other tools, they even had a supervisor, as I stated, a Tim Finell (ph), who still works there, searching for them. Because he was going around trying to find them, he said he had them, he knew I had them there, but they disappeared some time in the six or seven months I was off. I had no way of knowing that they'd disappear until I asked about retrieving them.

THE COURT: Okay. But you were off until April 2004.

MR. PENLEY: I was off -- I've never returned -- I actually never returned to work to Delphi.

THE COURT: Right. It just seems to me --

MR. PENLEY: I never physically came back into the plant since October.

THE COURT: I understand. But since -- but the tools were not in your possession during that whole period. It just would seem to me that that's -- you know, that that's something you would be resolving as part of this settlement.

MR. PENLEY: Well, I didn't believe I needed to

retrieve them, because I believe I was going back to work there. I did not know I was not going back to work till --

THE COURT: Well, certainly by April 2004, you did.

MR. PENLEY: Yes. I accepted a transfer. At that time, they didn't reach the grievance settlement though until April 29th, I believe, of 2004.

THE COURT: Right.

MR. PENLEY: And when I was informed that they reached an agreement to settlement, that's when I inquired about my other tool box, about retrieving it, and that's when they said, well, we don't know where it's at.

THE COURT: Well, I appreciate your -- what you're telling me, but in looking at the settlement, and looking at the fact that the check was cashed, it seems to me that it's reasonable to assume and that the debtor --

MR. PENLEY: Excuse me, Your Honor. If it was reasonable to assume, then why'd they'd offer to settle?

THE COURT: Well, they did settle with you on this.

MR. PENLEY: No. They -- a copy of the attachment I said -- I sent to court is they offered to settle for the full amount of my claim at a 4.3 percent of the value.

THE COURT: Well --

MR. PENLEY: I sent a copy of that offer to the court.

THE COURT: I understand. But that's -- there are a lot of reasons why people agree to that, so that for example,

they don't have to pay their lawyers $400 an hour or more to have this hearing.

So in light of my assessment of the facts here, including the settlement agreement and the timing of it, I'm going to grant the objection to the claim. It appears to me that particularly in light of the cashing of the check, given the reference to missing personal items and Delphi's position consistently, I think, that this covers anything that's left at the site that the claim has been satisfied by the settlement.

MR. PENLEY: Okay. Thank you for listening to me, Your Honor.

THE COURT: Okay. I -- you're welcome. And that's the basis, not the basis that you turned back to the tools, but just that it was settled.

MR. PENLEY: I know, after six years, I tried to settle this in small claims court and --

THE COURT: Okay. All right. I appreciate it.

MR. PENLEY: -- I got drug through this, so.

THE COURT: Very well.

MR. PENLEY: Okay?

THE COURT: Thank you.

MR. PENLEY: I do appreciate your time. Thank you. bye.

THE COURT: Okay. So you can either submit this one on a separate order, or as part of anything covered by this

omnibus objection, whatever's more convenient. That's the same -- if there is more than one covered by an omnibus objection, you can put them all on the omnibus objections order. Okay.

MR. LYONS: Okay. Next, Your Honor, item number ten is the sufficiency hearing regarding the claims of Mr. James A. Lueke.

Your Honor, this actually was a matter that was adjourned. We had had an initial hearing --

MR. LUEKE: Good afternoon. This is James Lueke here.

THE COURT: Good afternoon, Mr. Lueke.

MR. LUEKE: Can you hear me?

THE COURT: Yes, I can. Can you hear me?

MR. LUEKE: Just barely.

THE COURT: All right. I'll try to --

MR. LUEKE: If you could speak at a little louder tone, that'd be appreciated.

THE COURT: Okay. That's fine. All right. You can go ahead, Mr. Lyons.

MR. LYONS: Yes. And, Your Honor, there were two -- the Court gave us two directions at the last hearing. The first was to try to see if there was a signed copy of this agreement, which was entered into pursuant --

MR. LUEKE: It's not a signed copy, a bona fide copy of the original agreement. Not some expo factor signed copy, that's unacceptable.

THE COURT: Okay. Mr. Lyons finish and then you can have your say, Mr. Lueke.

MR. LUEKE: Go ahead, Mr. Lyons.

MR. LYONS: So again, Your Honor wanted us to find -- to locate a signed copy of the agreement that implemented paragraph 96 of the national agreement, which requires the parties to seek an equitable solution any time a plan is closed, regarding the transfer between plans. And also to see if we could facilitate Mr. Lueke's presentation of his claim to General Motors.

Under the MDA, there was -- it was -- there was language that indicated that that type of a claim under UAW, a grievance under a UAW agreement, may well have been transferred to General Motors.

So pursuant to those two tasks, Your Honor, we did search for a signed copy of this agreement.

MR. LUEKE: Can you speak up? I'm having trouble hearing here.

MR. LYONS: Sure. I'm sorry. Can you hear me now?

MR. LUEKE: Yes. Thank you very much.

MR. LYONS: So we did try to locate a signed copy of this -- what I'll call an implementing agreement. Your Honor, we could not locate a signed copy in Delphi's files. We reached out to counsel for the UAW, and they could not find a signed copy as well.

However, both parties clearly understood that this was the operative agreement between the parties. So the parties re-executed that agreement in July -- what?

UNIDENTIFIED SPEAKER: September 2010.

MR. LYONS: Oh, September, it was actually this month they re-executed it. Your Honor, why we couldn't find a signed copy in the files, I can't really give an explanation, other than there are several agreements that the parties have negotiated between -- you know, between the UAW and the debtors. But clearly the UAW and Delphi understood that this is the operative agreement regarding the equitable solution under paragraph 96 of the national agreement.

THE COURT: And that document was the one that was submitted and it's the one that says it's not the full 26 workers that would be transferred, but the smaller number?

MR. LYONS: Correct. Just the two pipefitters.

THE COURT: Right. Okay. Did that -- did you all get an acknowledge -- I know that -- because I've read it. It came in, I guess, over night, Mr. Lueke's response, in which he says that someone at GM has told him he wasn't covered.

Did you deal with that second aspect of it or was it basically you were relying on the agreement that was executed in September?

MR. LYONS: We were relying on -- well, Your Honor, we did view that language, that it could cover a claim by Mr.

Lueke. GM -- I can report that GM has not acknowledged that.

THE COURT: Okay.

MR. LYONS: So there may be a dispute --

THE COURT: Have they disavowed it to you?

MR. LYONS: They -- well, not to debtor's counsel, reorganized debtor's counsel. But, Your Honor, I think it would -- they haven't expressly disavowed to us, although they have not acknowledged it either, so.

THE COURT: Okay. All right. Okay. So, Mr. Lueke, I got your response. The issue is, as I see it, that the agreement that the debtors have submitted is not just an agreement signed by the debtors, but by the UAW, too. Is there any reason why I should not assume that the UAW, since its responsibility is to look out for its members, is somehow changing the terms of the original agreement?

MR. LUEKE: Yes. Yes, as a matter of fact.

THE COURT: Okay. What would that be?

MR. LUEKE: There's a number of different circumstances. They weren't upholding grievances. They were trying to push grievances aside. They tried not to pay people's overtime, especially people that weren't there a longer period of time. The UAW International Union failed to represent them properly. I mean, I just want to bring that point in.

But getting back to the aspect of the Court record

here that Delphi, regardless of the actions of the UAW International Union, Delphi is required to hold that contractual agreement for the 96 A transfer, which included 110 people, of which 25 were supposed to be skilled trade.

Under bankruptcy law, they're supposed to provide and pull all those documents and keep them in safe keeping and as they need to be presented to the bankruptcy court, they should be held accountable and those should be available for the bankruptcy court in the proceeding.

THE COURT: Well, I understand that when documents are missing or not in the files, the Court can --

MR. LUEKE: Your Honor --

THE COURT: Can you hear me?

MR. LUEKE: Yes.

THE COURT: A court can hold a party accountable for that in the underlying litigation.

MR. LUEKE: Uh-huh.

THE COURT: But it's not required to. And one of the circumstances when a court may not hold them accountable is if the parties to those agreements actually acknowledge that the agreement that isn't in the file, the unsigned agreement, was in fact, their agreement.

MR. LUEKE: Well, there's definite -- there's sworn statements here of affidavits here --

THE COURT: Well, they're actually unsworn.

MR. LUEKE: That is not the original agreement that was ratified by the union membership as part of that -- as part of the restructuring agreement. There was a vote being held. This was representative addendum that there would be 110 positions offered available at the Kokomo plant up on shutdown and the ratification of this restructuring agreement. So if that ratification process would be considered null and void because the original agreement, the 96 transfer that was represented here to the skilled trades committee, as well as to the shop chairman, Scott Weber (ph), was for 110 people total, 25 of which would be skilled trades, and the operative agreement, included all that. It didn't just say two pipefitters. That's utterly ridiculous and a misrepresentation there by Delphi and its attorneys.

As I even pointed last time they tried to come to court with an unsigned, undated document and pass that off as the operative agreement that's --

THE COURT: All right.

MR. LUEKE: -- fraud on the Court, Your Honor.

THE COURT: All right. But I've reviewed what you've submitted, and as I understand it, that includes several unsworn declarations by employees who state that that was their understanding, consistent with your understanding.

And secondly, minutes of a meeting with representatives and affected employees, but I guess in my mind,

the agreement of the UAW to acknowledge that this document was, in fact, their contract with the debtors overrides that.

MR. LUEKE: That's not true. That's ex post facto and it doesn't include, where are those other people that transferred?

THE COURT: But they're the union. They're your union and they're doing this. You may have some right against them.

MR. LUEKE: It should be --

THE COURT: You may have some right against them. You may have some right against the union, but they're saying, this was our agreement, and you know, they're --

MR. LUEKE: That is not the agreement. Furthermore, this statement is undated on the top, if you look at the memorandum of understanding entered into blank date of blank. There is no date on top. That means to pass off an undated -- this is not the contract I saw, Your Honor. This is -- the contract I saw was officially dated and signed, and I think it was signed by different parties as well.

THE COURT: But the agreement entered into in September by the union --

MR. LUEKE: That's post facto three years later, you're going to go back. You're going to take something three years later and then apply it to something that happened three years ago?

THE COURT: Well, if both sides --

MR. LUEKE: That's not even in the court record, Your Honor.

THE COURT: If both sides agree to it, I think I would and I think I will.

MR. LUEKE: Well, I don't believe that the jurisdiction of Dennis Kazinsky (ph) was the person that signed the original agreement. So we have a question of material fact on the original agreement.

THE COURT: I don't believe --

MR. LUEKE: Either that's the original agreement or not.

THE COURT: -- that's the case given the acknowledgement by the UAW. And on that basis, I'll grant the --

MR. LUEKE: You're going to grant the objection? That's fraud with that kind of agreement. I'm sorry.

THE COURT: Well, I don't believe it's fraud. If you believe the union has defrauded you, you have a right against the union. But they're your authorized representative and they've taken this position.

MR. LUEKE: What about a stipulation, Your Honor, to hold GM for that grievance?

THE COURT: Well, that's a separate issue. You have your rights against GM under the agreement. Again, the union can -- let me finish, sir. I've given you a lot of leeway

because you're pro se, but that does not give you the right to interrupt you.

MR. LUEKE: Okay. I'm sorry. Go ahead, Your Honor.

THE COURT: You've got a right through the union to pursue grievances against GM, based upon its apparent assumption of obligations. You can pursue those if you wish. But as far as the debtor is concerned --

MR. LUEKE: Uh-huh.

THE COURT: -- I am satisfied with the acknowledgement by the union, in essence, you're seeking to enforce the union agreement --

MR. LUEKE: Okay.

THE COURT: -- it was an agreement that the union has acknowledged is in the form that the debtors have also said it is.

MR. LUEKE: I'd like to --

THE COURT: Now, if you think the union is somewhat letting you down on this, you may have rights against the union. But these are the two parties to the agreement, and they both say, this is what we agreed to.

MR. LUEKE: Okay. That's fine. But I'd like to get confirmation on those signatures, because I tried to get ahold of that Dennis Kasinksy and he would not return my phone calls.

THE COURT: Well --

MR. LUEKE: And I'm not aware that that may or may not

be --

THE COURT: If --

MR. LUEKE: -- his valid signature.

THE COURT: If it is not, then you have a very clear right to come back and seek relief from me.

MR. LYONS: And, Your Honor, to that point, we did follow-up after Mr. Lueke had raised a question as to his authority, and I have an e-mail from the in-house counsel of the UAW that he is not retired, and that he had full authority to sign the document, which I'd be happy to hand up and make part of the record.

THE COURT: All right. And does --

MR. LUEKE: I tried to contact him and he would not return my phone call.

THE COURT: Mr. Lyons, why don't you send a copy of that document to Mr. Lueke.

MR. LYONS: We will.

MR. LUEKE: Can you get him to swear under the penalty of perjury that that's his signature and that's the full --

THE COURT: Well, he's an attorney --

MR. LUEKE: -- operative agreement?

THE COURT: -- for the UAW, it's being represented to the Court by an attorney for the UAW that, in fact, his client was authorized to sign this on behalf of the UAW. You're going to have a copy of it sent to you. That's sufficient for me.

MR. LUEKE: I'm saying that's just not the full operative agreement, that's a --

THE COURT: Well --

MR. LUEKE: -- partial operative agreement.

THE COURT: I understand. But the party to the agreement is disagreeing with you, both parties. So on that basis --

MR. LUEKE: Well, then you can have them sign a signature saying that's all they're taking is two pipefitters, and you're denying Lueke's contractual rights --

THE COURT: He's already --

MR. LUEKE: -- against the UAW and that --

THE COURT: The effect of what's being submitted does that. And again, the debtors will mail you the follow-up letter on authorization.

MR. LUEKE: So you have a signed -- all's I want to do is get verification that that signature's correct, that that -- because like I said, I was not able to verify that from Dennis Kazinsky himself, because he was not returning phone calls.

THE COURT: You can follow-up with his lawyer, the in-house lawyer for the UAW.

MR. LUEKE: Well, I think that should be presented to the Court and that should --

THE COURT: It is being presented to the Court. It's a representation by a lawyer, who will get into enormous

trouble if it's wrong, that his client was authorized to sign it on behalf of the UAW.

MR. LUEKE: Uh-huh.

THE COURT: It's represented to me, as well as being represented by the lawyers for the debtors.

MR. LUEKE: It's not the full contract --

THE COURT: Well, I'm sorry.

MR. LUEKE: -- in ex parte.

THE COURT: I've already found that it is based on that agreement. So we're going over old ground on that. So I'm going to have to move on at this point, but the debtors should --

MR. LUEKE: Well, if you can send that out about verification or have it verified to the Court that's his signature and that that's the full operative agreement, you know, I have nothing to stand on. I know this is a hack job, you know.

THE COURT: Well, all right, very well. So the debtor should submit an order on that point.

MR. LUEKE: So the debtor -- that's it, I guess.

THE COURT: Yes.

MR. LUEKE: Okay. Well, I appreciate your time there, Judge Drain.

THE COURT: Okay. And again, this relief simply affects the claim against the debtors.

MR. LUEKE: And can -- and I can submit a claim, though, against General Motors or keep pushing it?

THE COURT: That's up to you. That's why I said this just affects the claim against the debtors.

MR. LUEKE: Okay. You know I've been up against the wall on this for so long because the UAW is trying to deny my grievances as well, so.

THE COURT: Okay. All right. Very well.

MR. LUEKE: Okay. Well, yeah, I know they sent all the jobs out of the country here with the Delphi agreement. But all right, have you a good day, Your Honor, and thanks for the counsel there for Delphi. You guys have a good day as well.

THE COURT: Okay.

MR. LUEKE: Okay. Bye.

MR. LYONS: Item number 11, Your Honor, on the agenda is the claim objection of Randy Austin.

Your Honor, this relates to a claim for allegedly denied relocation services.

THE COURT: Right.

MR. LYONS: It has an awful lot of information in the file, given the amount of the claim. This is an evidentiary hearing. We did try to take some discovery from Mr. Austin to get clarity, particular on what damages he alleged to have suffered as a result of the denial of the relocation services.

But at a threshold matter, in order to get relocation services, you had to contact the relocation company within 60 days of your termination, and there is no evidence that he did that within the 60 days. There's some ambiguity in the documents that he submitted.

THE COURT: And the evidence that he did it outside of the 60 days is based on what? That it was on July 17th. That's based on a declaration by the out-placement people?

MR. LYONS: Well, Mr. Oneier (ph) who investigated the claim pursuant to his role --

THE COURT: Right.

MR. LYONS: -- as claims administrator.

THE COURT: But where do they come from? I mean, how did he know that it wasn't?

MR. LYONS: Well and this is again, it's part of the record. He sent an e-mail to the company on July 17th, and I guess he was speaking with a friend --

THE COURT: Okay.

MR. LYONS: -- who mentioned these relocation services.

THE COURT: So it's based on that e-mail and the inference that until that point, he didn't do anything because of the nature of the e-mail.

MR. LYONS: I think a pretty clear inference could be drawn from that e-mail, yes.

THE COURT: Okay. It's not even clear whether he did contact anyone there, when he actually contacted the out-placement people.

MR. LYONS: There's no evidence of that. I mean, he says he heard back from the person, but there's no written documents that affect --

THE COURT: And his response just basically says around July.

MR. LYONS: Yeah. He never really comes out and says he contacted us within the 60 days.

THE COURT: Right.

MR. LYONS: And then also just the other point is the damages. I mean, you know, we were trying to get itemized detail, and you know, we understand he's pro se, so we gave him the great latitude and -- but we just wanted precision. I mean, what -- how was he damaged, and he came up with a list of college tuition and some other items, and we wanted them itemized, we wanted proof of payment so we could see if they even fell within the scope of a potential relocation services claim. And, Your Honor, there really was no kind of detail at all.

THE COURT: All right. And, Mr. Austin, you're not on the phone, right? There's no one on the phone on his behalf? No. And he's not here.

In light of that, and in light of the Unrue (ph)

declaration, as clarified on the record, I will grant the objection. Mr. Austin's request was untimely and further, he has not established that he actually has a monetary claim. The debtors aren't providing out-placement services at this point, right?

MR. LYONS: No.

THE COURT: No? So there's no way to fix it.

MR. LYONS: No. And it --

THE COURT: So it really is a monetary claim and there is no monetary claim at this point?

MR. LYONS: Right. And it is really a firm policy that the company has, that it has to be within 60 days. I mean, they obviously are administering this program --

THE COURT: Okay.

MR. LYONS: -- to, you know --

THE COURT: Well, I'm just saying this is an alternative basis. I've already found the 60 days doesn't apply, but separately and apart from that, I don't see any damages here.

MR. LYONS: Very good.

THE COURT: Okay.

MR. LYONS: Your Honor, I'd like to turn over the podium to my partner, Ken Berlin, to deal with a number of environmental claim objections.

THE COURT: Okay.

MR. BERLIN: Good morning, Your Honor. I'm Ken Berlin representing the reorganized debtor.

There is a series of claims relating to two different super fund sites that are before the Court today. One set of claims relates to the date and super fund site. The claimants are jointly called in the briefs, the ITW claimants and that's how I'll refer to them today.

There are a second set of claims that relate to the Tremont Land Fill and Barrel Site. The ITW claimants originally filed an objection to -- a response to our objection to the claim. They have since, however, withdrawn the claim. We obviously don't -- we don't object to that and we would like to see that claim withdrawn.

THE COURT: Okay. I know that the parties sometimes use other terms for these sites. Is it fair to just say this is the date and site we're talking about at this point?

MS. MAYHEW: Yes, that would be correct, Your Honor.

THE COURT: Okay. Fine.

MS. MAYHEW: Kristin Mayhew-Macleroy, Deutsch, Mulvaney & Carpenter on behalf of Illinois Tool Works and ITW Food Equipment Group.

THE COURT: Okay.

MS. MAYHEW: Thank you.

THE COURT: Good morning.

MR. BERLIN: On Tuesday, two other parties to the

Tremont sites, Peerless (ph) and Madriver (ph) did, in fact, respond to our objection and they did file a response, in which they basically incorporated the briefs that are filed in the Dayton claim. So I guess their claim is still live. They raised the same issues, and I thought I would argue both of them at the same time.

THE COURT: Okay.

MR. BERLIN: Your Honor, let me start off by just giving a brief introduction about the Dayton site, talk a little bit about the super funds statute and talk about the environmental matters agreement.

The Dayton super fund site is a site that stopped operation in 1996. There's no dispute about that. We have documents in the record from EPA, wherein EPA said the site stopped operation in 1996. The ITW claimants have been doing a great deal of work at the site for many, many years. They have not filed any documents or really made -- or really even argued that the site closed after that.

The consequence to that is that the hazardous waste that was sent to the site was sent by General Motors before the spin off of Delphi. Under the super fund statute, General Motors is responsible for clean-up at that site.

And as Your Honor knows, once you touch a super fund site, you remain liable on that site really permanently, I guess, their bankruptcy could affect that, but they remain

liable at the site, at least until the bankruptcy. There was nothing we could do in an agreement, or they could do in agreement with Delphi that transfers that liability away from General Motors to Delphi. As a matter of law, with respect to third parties, they remain liable at that site permanently.

In contrast, Delphi never sent any waste to the site. It only was spun off after 1996, and under the super fund statute, Delphi has no liability for clean-up at that site under the statute. It did not send waste. It was formed after the site was -- after the spin-off.

So General Motors has liability for the site under the super fund. Delphi has no liability.

In the environmental matters agreement, what Delphi did is could not release General Motors from liability at the site. Essentially, what it did in the environmental matters agreement was agree to satisfy the obligations of General Motors at the site, at least as long as the environmental matters agreement was in effect, and that agreement was terminated as part of the MDA and the plan of reorganization, and I'll talk about the legal implications of that.

Based on that set of facts, Your Honor, let me turn to legal arguments that are made about Delphi's liability, and they fit into two categories, successful liability and assumption of liability, although assumption of liability, I guess the category is successor.

The first argument that the ITW claimants make is that there was, in fact, a de facto merger here when the spin off took place. And if Your Honor looks at the brief, there's a lot of discussion, a choice of law issues, whether Delaware law should apply or higher law should apply, or whether a federal -- there should be a common federal standard at the sites.

We argue Delaware law based on a Southern District case that says successful liability is governed by the law of the state of incorporation of the party, but -- and, in fact, the ITW claimants don't contest that a Delaware law applies, at least they haven't submitted a brief, any briefing on it that there would not be a de facto merger here.

But it doesn't matter, Your Honor, which law applies. Because under Delaware law, under Ohio law, and under the federal cases that are cited by ITW, there is one factor in these cases that cannot be met by the ITW claimants. And that factor is, there has to be a dissolution of the company that sold the assets.

That did not happen here. General Motors is still in existence and therefore, they can't prevail. Under Ohio law, which they argue, we cite an Ohio Supreme Court case, an Ohio Court of Appeals case, the first was Welko (ph), the second one was Texlon (ph), and a Third Circuit case applying Ohio law, all of which say that they need, under Ohio law, a dissolution of the company that transferred the assets.

In the Welko case, they say no de facto merger when selling corporation continues to exist after the sale of one of the divisions, even if the selling corporation no longer conducts the same operation of the division. And the Texlon case says the de facto merger presupposes that the predecessor corporation no longer exists. In the federal cases they cite, although they don't try and develop a federal standard, also has that same factor there.

So on this ground, common throughout, any choice of law that's made, a de facto merger doesn't apply, and that makes sense. There certainly was no -- nothing that anyone would think of as a merger in this case.

They tried to make two arguments to respond to that in their brief. One is, it should be a relaxed standard because this is a tort case, aside from the fact that we dispute whether this was a tort case, a clean-up case, the Ohio law is clear that there is no relaxed standard in tort cases in Ohio.

We cite the Flagra (ph) case and we also cite the Welko case. They cited it too, but what the Welko case basically says that we're not going to allow that in these cases because it would have too big a chilling effect on mergers and acquisitions in the State of Ohio.

They also try and argue that you don't have to meet all of the elements of a test for a de facto merger under the super fund statute released in this case, but again, all of the

cases I cite in Ohio say this is a factor that has to be met.

The only time that they -- the one case they cite under that Ficite (ph) case, says that if, in fact, there is a dissolution of a company, we're not going to let you out of the de facto merger doctrine, just because one of the tests, the asset fasak (ph) transaction is not met, because there, in fact, has been a real dissolution of the company there.

When we turn to the mere continuation prong on this, the second test, we have the exact same situation as we do in the de facto merger. There, the Ohio courts say that there has to be only one company left after the transaction takes place. We cite three cases, Travis, Magore (ph) and Cytec (ph), all of which say that that is required. And in the Preklow -- the Perko (ph) case, the case that they cite, that case says as a prerequisite all was -- substantially all of the assets of the company have to be transferred or there has to be a sham (ph) transaction. Neither of those took place in this case, so we don't think there's a basis for that.

Again, the only real response that the ITW claimants make, is that the Perko factor is ownership in these cases. If there's the same ownership at the end, there is a mere continuation of the company. But all of those ownership cases also pre-suppose that only one company is left after all the assets have been transferred, if you look at the facts on that. In any event, here, there is no continuation of ownership. The

agreement provided that the stock would be distributed. It took a few months to do that, but that was also the case with Perko, the case that they rely on.

The third argument they make is an assumption of liabilities argument, basically saying that once we signed the environmental matters agreement, we assumed the liabilities of General Motors.

Again, we have now canceled that agreement or terminated the agreement. The result of that termination is that our agreement with General Motors to satisfy their liabilities is gone, and now General Motors again remains responsible for all the liabilities at the site, as they have been, as a matter of law, throughout the entire period, including the period of this agreement.

The ITW claimants are not third party beneficiaries of the -- of this agreement. They don't meet the tests. They need to meet that. Two of the tests that aren't met are that a material purpose of the agreement between General Motors and Delphi would've had to be to protect their interest in this case. It actually had nothing to do with the agreement as we negotiated at the time. The purpose of that agreement was to allocate various clean-up liabilities between Delphi and General Motors. General Motors agreed to take all known liabilities at these super fund sites. We agreed to take unknown liabilities at the time at these sites. And there's a

requirement that the agreement --

THE COURT: I'm sorry. Before we --

MR. BERLIN: Sure, sure.

THE COURT: -- go on to the second reason there, I struggle with this a little bit. Is your argument that it's -- the fact that it's an allocation agreement means that it's not a material purpose to protect other contributing parties, based upon the fact that GM is still liable, and is just an allocation as between GM and Delphi?

MR. BERLIN: Yes. I mean, in other words, the -- there's no purpose -- the third parties do not -- they don't really benefit from that in a sense. GM has always been liable under this agreement, as a matter of law to them, it stays liable. All we've really agreed under this is to step in and satisfy GM's liabilities. But that agreement's now been canceled, so the liabilities go back to GM.

They have the rights against GM. What they want is the right essentially to go against two parties for the same liability. Because they have the right against GM, they have the right against us. If they were third party beneficiaries, maybe, but this agreement was not done. We did not even know when we signed this agreement that they existed. I mean, this agreement only covered unknown sites at the time.

THE COURT: But I guess that's -- that was maybe what gave me pause. It would seem to me that I don't see how that's

relevant. I mean, it would seem to me, in some respects, it cuts against you, because you were allocating, you know, rationally that the new buyer would take over things that were unknown at the time, because that was the new buyer's risk. You know, it had performed its due diligence, and it didn't think there was anything there, but if there was something there, it wasn't a new buyer, the transferee, but if Delphi thought there was -- but if Delphi didn't think there was anything there, then it should take the risk if there was something there.

But again, to me, it all comes down to the primary purpose. Your argument really seems to hold weight if it does at all, because it's the primary purpose of the agreement or the only purpose of the agreement was to allocate as between the parties, or shift the risk as between the parties.

MR. BERLIN: Right. And I think that's correct, Your Honor. Again, GM was shifting the risk to us on these unknown sites. They agreed to take that risk back when the environmental matters agreement was canceled. They remained responsible. But throughout this whole time period, even though they shifted the risk to us, it was really only to us as to private parties, because GM still remained liable to the ITW claimants throughout this time period. They could've sued GM at that time period, as a legal matter, they would've had full rights to recover against GM during this time period.

THE COURT: And I guess that raises my other question. They -- the claimants assert that their claims arise during this time period, because they've had to spend money during the period where the EMA was in effect. Is it your position that under CERCLA they're not covered?

MR. BERLIN: They have no rights against us under the circumstances.

THE COURT: So --

MR. BERLIN: They have rights against General Motors.

THE COURT: So this would -- so the only right you're acknowledging here, because of the EMA, would be a right if they were an intended third party beneficiary?

MR. BERLIN: That's correct.

THE COURT: And so that's based on state law, third party beneficiary law, not based on CERCLA?

MR. BERLIN: Right. It's not based on CERCLA. From our standpoint, we have no liability under CERCLA. The only liability that we would have is a contractual liability that we would have to -- this party is a contractual liability. Has no liability under CERLA.

There are four tests under CERCLA. We would have had to have arranged for the transportation of the waste, we didn't do that. We'd have to be the owner operator of the site at the time of the release, we weren't. We have to be the current owner operator of the site at the time, we would've had to have

transport the waste. We never did any of those. There is no liability to us under CERCLA.

You know, essentially, this -- the other way to look at it is it's equivalent of an indemnity agreement to General Motors as part of this. We took over their liability, even though they continue -- we've agreed to pay their liability, even though they continue to be liable under CERLCA --

THE COURT: All right.

MR. BERLIN: -- and we were not liable.

THE COURT: There's -- neither side, I think, cites any case where the parties to indemnification agreement or contribution agreement, a private agreement like this terminated the agreement, and someone tried to enforce it in an environmental context, right. I didn't see those cites.

MR. BERLIN: I think we could find anything that was really directly on point.

THE COURT: I mean, it's unusual for it to happen. Normally, someone's in GM's position would never terminate it.

MR. BERLIN: Right.

THE COURT: They had other reasons to terminate it.

MR. BERLIN: Right, right.

THE COURT: Okay.

MR. BERLIN: Yes. We could not find a relevant case that was directly on point to what we're talking about here.

THE COURT: Okay.

MR. BERLIN: So I think that --

THE COURT: Except general third party beneficiary law cases?

MR. BERLIN: Right. Except general third party beneficiary law, which again is supportive. And in a third party beneficiary law is that the agreement has to be intended to benefit the specific party.

Yeah, and in fact, the EMA also, Your Honor, has specific -- has a specific statement and in paragraph 9.1.6, no rights are created in any third party by this agreement. So we not only have the law of the state, we also have specific language in the agreement, that no third party beneficiary rights were being created. This was just an allocation of risk between the two parties.

THE COURT: Okay.

01:22:44

MR. BERLIN: Just one second, Your Honor, I'm sorry.

(Pause)

MR. BERLIN: Your Honor, it just was pointed out to me that you enforced a no third party clause in the Light Source (ph) matter in this case.

THE COURT: That wasn't an environmental thing, though, right?

MR. BERLIN: That was not an environmental point.

THE COURT: I mean it -- as I said, I'm not -- I

couldn't find or we couldn't find any cases in this context either. But it didn't seem -- maybe you can address this. It didn't seem to me that liability would exist under CERCLA based on the EMA.

MR. BERLIN: Right.

THE COURT: And if there were -- I mean, I'm just telling you to do it when you speak later, but that, you know, if the agreement were worded appropriately or I found the facts to be appropriate, there might be liability under contract law principles or third party beneficiary law principles, so.

MS. MAYHEW: Your Honor, would you like me to address that now?

THE COURT: No, no, just make a note.

MS. MAYHEW: Okay.

THE COURT: Okay.

MS. MAYHEW: Thank you.

MR. BERLIN: Okay. And, Your Honor, the ITW claimants also make a number of cases that really again relate on the assumption of liabilities that relate to CERCLA. You can't dispossess the parties of their rights under CERCLA. We agree with that, but the party that can't be dispossessed the -- their rights were GM and not against us under CERCLA.

THE COURT: You can't contract out of CERCLA.

MR. BERLIN: Right. We cannot contract --

THE COURT: But you said you can contract in to --

MR. BERLIN: Right.

THE COURT: -- liability, but it's not under CERCLA.

MR. BERLIN: That's correct.

THE COURT: Okay.

MR. BERLIN: Finally, Your Honor, the last argument I'd like to make very briefly is the 502(e)(1)(B) argument, you don't have to reach that obviously if you rule for us on the first three on the issue of successful liability, on assumption of liability. But if you ruled against us, we can see that there are some expenses that ITW has already paid, and therefore, are not contingent, and therefore, they're not subject to 502(e)(1)(B). But any future expenses that are due are, in fact, contingent expenses.

The EPA has filed a claim in this case against us between 20 and 50 million dollars, seeking the same relief that ITW would be seeking in this case. And they cite three or four cases to support their position on this, but all the cases except for one do not involve a situation where there was a claim by the government at the same time, seeking to recover the same money.

They do cite a case, the Allegheny case outside the circuit that did, in fact, looked at CERCLA and said, well, this is really direct claim under CERCLA and not a contribution claim. So 502(e)(1)(B) doesn't apply, but that was criticized in the In re: Drexel Burnam (ph) case in the circuit on the

ground that 502(e)(1)(B) is not limited to contribution claim. It's contribution or reimbursement claims and what's happening here, the government is seeking recovery for the same funds that the ITW claimants are seeking in that case.

I'm not sure whether ITW is even maintaining the argument on contingent claims, but the contingent claims that have not yet been paid are ones that should be barred by 502(e)(1)(B). Thank you, Your Honor.

THE COURT: Okay. I mean, I guess 9613(f) does say, may seek contribution.

MR. BERLIN: I'm sorry?

THE COURT: 9 CERCLA, 42 USC 9613(f) says, any person may seek contribution from any other person who's potentially liable. Your argument -- it's not only a reimbursement right.

MR. BERLIN: Right. Well, there are two sections of CERCLA, one allows contribution and one allows direct claim. I actually don't think they're contesting that under the contribution provisions --

THE COURT: Okay.

MR. BERLIN: -- the 502 language would apply.

THE COURT: All right.

MR. BERLIN: What they're saying is on direct liability provisions, it should apply and we agree that if they, in fact, spent money and it's not contingent, then it doesn't apply. But where they haven't spent money, it's

contingent and the government is seeking to recover funds for the exact same issue. The fact that it's a direct claim should be irrelevant, because it's a reimbursement claim.

THE COURT: Okay.

MR. BERLIN: Thank you.

THE COURT: All right. Well, I'm sorry, is it your view then that -- well, I guess what you're saying then is if the -- if DPH settled the EPA claim for, you know, some relatively small amount, is that settlement then binding on the ITW claimants for the amounts that they haven't yet incurred out of pocket?

MR. BERLIN: The -- usually the way -- you know, because you really --

THE COURT: Or would you have to have a contribution? I'm just trying -- a contribution bar or --

MR. BERLIN: Yeah.

THE COURT: -- I'm just trying to think through that issue.

MR. BERLIN: I'm not sure the typical EPA settlement, when they settle the contribution claim protects the CERCLAs from any other claims by any other parties. It's not quite as clear yet how that works on these direct claims, because this direct claim law is very recent. It's just arisen in the last year or two in these cases.

THE COURT: Okay.

MR. BERLIN: So I'm not entirely sure how that would work out.

THE COURT: Okay.

MR. BERLIN: But the claim is out there right now and it's a contingent claim. We don't know how it's going to be resolved, but that's why you have that protection in 502, is because you have to deal with these contingent claims now, and it's contingent.

THE COURT: Okay.

MR. BERLIN: Thank you.

THE COURT: Thank you.

MS. MAYHEW: Good morning, Your Honor.

THE COURT: Morning.

MS. MAYHEW: Your Honor, ITW submits that the debtors are liable under CERCLA for its direct cost associated with the clean-up at the site for two separate reasons.

First of all, Delphi may have contributed waste directly to the site and is a PRP, and secondly, Delphi has successor liability for the waste contributing to the site by GM.

ITW has made sufficient allegations substantiating its prima facie claims necessary to withstand the debtor's objections at this juncture. As this Court is well aware, the sufficiency hearing is to be treated as a 12(b)(6) motion, and the claim should only be dismissed if ITW can prove no set of

facts needed to establish its claims. ITW can and will establish these facts necessary to prove its claims.

It's premature to dismiss the claims at this juncture without giving ITW to do additional discovery that may be needed to flush out certain of the successor liability claims.

THE COURT: Well, on the -- I read the response to the debtor's last filing, and I guess the issue I have is what is there in the claim beyond simply setting forth the elements, the statutory elements of -- from CERCLA to suggest that Delphi was actually an owner operator of the site when -- the site that is at issue here, when the site was still operating, and therefore, there might still be contamination costs, as opposed to Delphi being a successor after the fact.

MS. MAYHEW: Well, Your Honor, there are documents that were attached to the debtor's pleading that demonstrate, that appear to demonstrate that the -- that Delphi was not organized or was not created pursuant to the divestiture until 1998, I believe it was.

However, in their most recent pleading, they attach documents from a website that have not been authenticated. We don't know exactly what they demonstrate, and they don't clearly say that the facility was closed in 1996. They make some reference to the fact that things occurred from 1941 to 1996, but there is -- the question remains as to whether or not they did dispose of any waste at that site. And the EPA, in

its proof of claim, and pursuant to its special notice letter in December of 2005, have identified Delphi has a PRP, and are asserting CERCLA liability against us.

THE COURT: But what --

MS. MAYHEW: So those are factual questions that need to be resolved.

THE COURT: But what facts have you -- I haven't seen any facts that you've asserted that Delphi fell within any of the four -- except the issue on successor liability.

MS. MAYHEW: Well, it may be that they have transported waste while they --

THE COURT: But how --

MS. MAYHEW: -- operated. But we don't know whether or not that's true.

THE COURT: But is that enough to have a -- I mean, aren't you just stating the terms of the statute?

MS. MAYHEW: Yes, that is correct.

THE COURT: So then you're forcing --

MS. MAYHEW: But --

THE COURT: -- them to prove a negative. I mean, you're basically saying, prove that you're not covered by CERCLA.

MS. MAYHEW: Well, I think they would have to -- the EPA is asserting its claim that they do have CERCLA liability and unless they down the road are able to demonstrate --

THE COURT: But they may be -- they may -- I mean, is there any fact in their claim other than successor liability obligations? I mean, I understand that this is a sufficiency hearing, but I think you have some obligation to prove -- not to prove, to assert some fact other than just reciting the statute and saying that they violated the statute.

MS. MAYHEW: And the fact that they've been named as a PRP by the EPA and --

THE COURT: But that --

MS. MAYHEW: -- special notice letters were issued to them for their contribution of waste to the site.

THE COURT: But do those special notice letters refer to any facts, as opposed to successor liability?

MS. MAYHEW: To them specifically, I don't believe so.

THE COURT: Okay.

MS. MAYHEW: The special notice letters are issued to all the PRPs --

THE COURT: So I mean, if this -- I'm sorry, go ahead.

MS. MAYHEW: No, go ahead.

THE COURT: If this were a complaint and it was here on a motion to dismiss, wouldn't this fall into the category of a legal conclusion, because you're just reciting the statute, you're not alleging any fact that would support -- I'm not saying the fact has to be true, but you're --

MS. MAYHEW: Sure.

THE COURT: -- not alleging any fact that would support --

MS. MAYHEW: In addition to the --

THE COURT: -- falling within the four prongs, other than successor liability, and we'll get to that. I'm not talking about successor --

MS. MAYHEW: Right.

THE COURT: -- liability here. I'm talking about the owner operator liability for, you know, actually causing the problem or running the plant when there was a problem or, you know, having to dispose of stuff when there was a problem. I just don't see that in the claim or any of the responses.

MS. MAYHEW: I would say the fact that EPA is asserting liability against them for this purpose, and that through discovery we would establish and be able to determine whether or not they did, in fact, dispose of waste.

THE COURT: But I think the Supreme Court has cautioned us that we, you know, there is a gatekeeper function here, and you know, subjection in the discovery without having any fact is, you know, a problem under Iqbal (ph) and you know, the like.

MS. MAYHEW: Right. Other than the fact that they --

THE COURT: This isn't a plausibility issue. This is basically the first step in the Iqbal analysis which is legal conclusions, couched as factual allegations don't count. And I

think you're just basically saying that they fall within here because they owned it at some point, and I'm not sure that's enough.

MS. MAYHEW: They -- well, we know that they owned the facility that contributed waste to the site in 1998 and it could very well --

THE COURT: But there's -- no one has come out and said in the proof of claim or subsequently, that they owned the facility at a time when it was -- before it was shutdown.

MS. MAYHEW: That is correct, Your Honor.

THE COURT: And to me, I think that's necessary to get into the facts on and enable you to take discovery on more than that, on the PRP point.

MS. MAYHEW: Understood.

THE COURT: This has been going on for a while, too. I have to assume that, you know, it's not like the -- you just learned of this site a few days before the bar date. I mean, there's been time to develop the facts here by both the EPA and the ITW, and both of this case and -- in connection with the EPA claim. I think you need more on that point.

So why don't we turn to successor liability and assumption of liability.

MS. MAYHEW: Okay. Certainly, Your Honor.

One of the issues that needs to be addressed at the outset is the choice of law. The debtors have cited Sylvia Pan

Am (ph) for the proposition that Delaware law is the appropriate law; however, that case does not involve successor liability, and it appears that the more appropriate law to apply would either be federal law governing CERCLA and successor liability or Ohio claims.

It appears that the Second Circuit has not yet addressed this issue, as to whether or not you need to apply federal law in the context of successor liability, although the --

THE COURT: Well, for CERCLA purposes, right?

MS. MAYHEW: For CERCLA purposes, that is correct.

THE COURT: It certainly had other contexts.

MS. MAYHEW: Yes, yes, but not with respect to CERCLA. The Third Circuit, however, the rationale there is persuasive, according to the Third Circuit, in order to prevent CERCLA's goals of being invaded by states that unduly restrict successor liability, it is appropriate to use federal law.

Alternatively, Your Honor, if the Court feels that it's more appropriate to use state law and not adhere to federal law, it is ITW's position that under New York's Lex Lopi (ph) test, the Court should apply the law of the State of Ohio, where the tort occurred.

The CERCLA violations did occur in Ohio, the waste was disposed of in Ohio, the Delphi facilities are located in Ohio, and the Ohio EPA has been involved in the clean-up of the site.

THE COURT: Well, in the briefing submitted by ITW, there wasn't an express concession, but it seemed to me that there was no focus on the underlying substantive law of either Delaware or federal general law on successor liability.

Is it fair to me to assume that because of that, I should infer that under federal law and Delaware law, that the facts here preclude successor liability?

MS. MAYHEW: No. The facts do not preclude successor liability under either of those laws as well.

THE COURT: What -- why not?

MS. MAYHEW: We did not brief those issues. I, quite frankly, did not believe that Delaware law would apply. Federal law, because the Second Circuit has not yet ruled and there's no binding authority on that issue, our focus was really on the application of Ohio State law, to the issues of successor liability.

THE COURT: Okay. Well, do you have any case law to suggest that the fact that GM survived the spin off would preclude -- I'm sorry, I think I'm saying a double negative here. Let me start over again.

Do you have any cases to show that notwithstanding the fact that GM survived the spin off, that under either Delaware law or federal law of -- as applied in the CERCLA context, that Delphi would be liable as a successor?

MS. MAYHEW: Your Honor, I do not have that standing

here today. Certainly if Your Honor were to rule that Delaware law is the appropriate law to apply, then we could certainly brief that issue and provide you with the case law.

THE COURT: Well, I mean, it has been briefed by the debtors and they've cited cases that are pretty clear on this issue, both under Delaware and federal law. Why should I delay further on that, unless you're able to give me something that says something, you know, to the contrary?

MS. MAYHEW: I don't have that right now, Your Honor.

THE COURT: Okay. All right. Why under the New York cases that deal with successor liability, if I don't apply federal common law in the CERCLA context, would I turn to Ohio law, as opposed to the law, the state of incorporation?

MS. MAYHEW: I can --

THE COURT: There are a lot of New York cases that say when you're looking at successor liability, veil piercing, de facto merger, you look to the state of incorporation.

MS. MAYHEW: And I think those cases deal with situations where you're dealing with a contract interpretation, and you're not looking at them from a torts perspective or in the context of CERCLA, where there is an injury, and I would think that the state where the injury occurred is going to have far more interest in making sure that the law is applied using its laws, as opposed to an agreement.

If you're looking at what the parties agreed to, it

may very well be that you look to the state of incorporation, if you're interpreting a contract, but --

THE COURT: But we're not interpreting a contract here, are we? We're trying to show whether in fact there's a -- on an equitable basis, there should be a de facto merger or, you know, a mere continuation or some form of successor liability, right? I mean --

MS. MAYHEW: And that's why you would look to Ohio where the injury occurred, because that state is going to have the most interest in seeing that this issue is resolved in accordance with its own laws.

THE COURT: But generally speaking, the law of non-contractual successor liability, where there's not an express assumption of liability, isn't that focused on the conduct of the two entities, the two corporations, vis a vis each other and the use of their corporate form, and whether, in fact, notwithstanding that the merger wasn't documented as of our -- it was in fact, or an equity, a merger. And so you're looking at not the wrong that was done to people because of it not being treated as a merger, but whether it should be treated as a merger in the first place.

In other words, you're not looking at underlying tort. You're looking at the conduct of the corporations, and that to me seems to be again, focusing on the law of the state of incorporation, because the state of incorporation lays out and

has a key interest, the key interest in when the limitation on liability for a corporation will be disregarded.

MS. MAYHEW: But wouldn't the result then be that parties would be at liberty to choose those states when they're setting up a transaction or a merger or a sale to go to those states that may not be favorable to successor liability in order to avoid certain torts down the road?

THE COURT: Yes, to some extent. I think that's right.

MS. MAYHEW: And so ITW's position would be that parties should not be permitted to do that, to forum shop, and select a state where it may be most favorable to successor liability, and in fact, should look to the state where the harm actually was occurred, and they are left addressing the issue.

THE COURT: Okay. All right. So turning that to Ohio, is there anything beyond the Cytec case that you can point me to that would again answer in your client's favor my earlier question, which is under the law of Ohio, could successor -- I'm suing the term generically, successor liability be found notwithstanding the fact that GM survived?

MS. MAYHEW: That is the premier case that -- the Southern District of Ohio case that we found that said that under Ohio law, you're only required to look to the hallmarks of whether or not a de facto merger occurred, but it is not the critical issue as to whether or not there was a surviving

corporation after a sale.

THE COURT: Well, that's not what Cytec said. It didn't say that -- maybe I misheard you. Are you saying it's not critical that there was a surviving corporation?

MS. MAYHEW: I think that's one of the four elements that courts will look to determine whether or not there is a de facto merger.

THE COURT: Right.

MS. MAYHEW: But the Cytec court held that you did not need to have all four of those elements, in order to find --

THE COURT: But the --

MS. MAYHEW: -- that there could have been a de facto merger.

THE COURT: But the one that they said was not necessary was not that point.

MS. MAYHEW: That is correct, Your Honor.

THE COURT: Right.

MS. MAYHEW: Yes.

THE COURT: Okay. In that case, the creditors would've been left holding the bag, because there was no surviving other entity.

MS. MAYHEW: Correct.

THE COURT: Okay.

MS. MAYHEW: Your Honor, with respect to the mere

continuation theory of successor liability, ITW submits that Delphi is the mere continuation under -- because there is a similarity of directors, a similarity of shareholders, and a similarity of stock.

The debtor does rely on the Perko Limited versus Great Lake Factors' case, and it is ITW's position that the debtors misread that case. That case actually is favorable to ITW, and the Court there held that there was successor liability based on a mere continuation theory, because the stock was held by the same parties.

The -- had the buyer created an ESOP and had the stock been transferred to the employees, then there would be no successor liability, but in that case, they didn't transfer the stock, and in fact, the Court held there was a mere continuation of successor liability.

THE COURT: Okay. But again, the cases you're relying on in this context are cases where -- tell me if I'm wrong. I mean, I don't think I am, but tell me if I'm wrong. That again, the -- unless the defendant was found to be a mere continuation, then they'd be left -- that the creditors would be left holding the bag, right? There was no --

MS. MAYHEW: I think the focus on the mere continuation as distinguished from the de facto merger --

THE COURT: Right.

MS. MAYHEW: -- is whether or not there's an identity

of ownership, are they the same corporate owners. And our position is that subsequently to the divestiture, GM still retained an 80 percent stock ownership of Delphi, and therefore, it is the same entity.

THE COURT: Okay.

MS. MAYHEW: Your Honor, turning to the third theory of successor liability, which is whether or not Delphi assumed GM's liabilities at the site.

It's undisputed that under the environmental matters agreement, Delphi did agree to assume the environmental liabilities associated with certain waste disposal sites, including this site.

The debtors take the position that the assumption of liability was negated by the master disposition agreement, dated July 2009, and that that allegedly terminated that agreement. Your Honor, even if the termination were to be given effect, ITW's claims predated that termination. They were filed in the bankruptcy case at least three years prior to that, and actually existed well in advance of that. Therefore, the debtors are liable for the claims that arose before the termination.

Secondly, even if GM and Delphi can enter into a global resolution --

THE COURT: I'm sorry. On what basis would they be liable, would Delphi be liable?

MS. MAYHEW: Because the claims postdated the environmental matters agreement and predated --

THE COURT: Well --

MS. MAYHEW: -- the termination.

THE COURT: But they'd be liable to GM, right?

MS. MAYHEW: They would be liable to GM, but as a beneficiary of that agreement, ITW --

THE COURT: All right.

MS. MAYHEW: -- would be able to enforce it and that is --

THE COURT: So it would require me -- I'm sorry to interrupt. But it would require me then to find that ITW and any other potentially responsible party would have a right under CERCLA to seek contribution or direct claim was a beneficiary of that agreement.

MS. MAYHEW: That is correct, Your Honor.

THE COURT: Okay.

MS. MAYHEW: And the case that we cited in our brief In re: Safety Clean (ph), from the bankruptcy from the District of Delaware is directly on point and does support this proposition that it says, if I quote, when a buyer expressly assumes liabilities of a seller, it becomes directly liable therefore, regardless of any language in the sale agreement, otherwise purporting to generally disclaim third party beneficiary rights.

THE COURT: But in that case, the agreement was still in effect, right? And the judge carefully reviewed the entire factual pattern to determine they were an intended beneficiary or not.

MS. MAYHEW: That is correct, Your Honor.

THE COURT: Okay.

MS. MAYHEW: And just because they terminated it after the fact, doesn't mean that the -- their liability should immediately evaporate. I think that would be against public policy where the debtors and GM --

THE COURT: But you still have to -- I would still have to find that the other PRPs were intended beneficiaries, right?

MS. MAYHEW: That is correct.

THE COURT: Okay. So what is the basis for saying that they are?

MS. MAYHEW: That they are third party beneficiaries?

THE COURT: Yes.

MS. MAYHEW: Well, the party was -- the agreement was entered into so that GM would no longer be responsible for certain environmental liabilities, but --

THE COURT: But it is responsible under CERCLA.

MS. MAYHEW: It is responsible under CERCLA but not under the environmental matters agreement. They transferred their liability to Delphi.

THE COURT: Well, I guess again, I guess that goes back to the King case again. It seems to me that the mere fact that there's an indemnification agreement or the EMA agreement isn't enough, there has to be more to show than intended beneficiary relationship, right? I mean, if it were just the fact that they had an allocation of responsibilities, then Judge Walsh wouldn't have to spend 30 pages going through a detailed factual record about whether there was an intended beneficiary or not. It just would have said, look, the seller wanted to get out from under exposure, and that's enough.

MS. MAYHEW: Well, I think that there was an agreement it wasn't necessarily benefiting Delphi that it had assumed GM's liabilities. It was for the benefit of third parties who may be harmed by their conduct.

THE COURT: But why would anyone agree to that? That just exposes them to folk like ITW. I mean, again, I -- what is --

MS. MAYHEW: I can't speak to the logic as to why they would do that, but that was part of the agreement, and certainly the beneficiaries --

THE COURT: No, but --

MS. MAYHEW: -- but the intent was --

THE COURT: I -- it seems to me you're coming back again to relying on just the presence, did I say King, I meant Safety Clean earlier.

MS. MAYHEW: You said King.

THE COURT: You're coming back to my mind to simply the presence of the or the fact of the agreement in the first place, to lead to the conclusion that the PRPs are intended beneficiaries. And again, I guess I say then if that were the case, why would Judge Walsh need to spend 30 pages analyzing the parties' intent? You just look at the agreement and you say, well, okay, obviously they assumed the responsibility of paying the PRPs, so they're an intended beneficiary.

MS. MAYHEW: But they didn't -- well, they were identified as PRPs subsequently to that agreement.

THE COURT: Right. I understand, but I don't see a distinction there.

MS. MAYHEW: So -- well, they wouldn't have been named at the time of the agreement, but they do say any newly identified waste disposal sites, they'll have the liability for that.

THE COURT: Okay. Is there anything other than the fact that they were -- that the EMA was entered into, that I should take away from either the EMA itself or any facts in the record to show that -- or any facts pled that show that PRPs were intended beneficiaries?

MS. MAYHEW: I don't think at this juncture, without the benefit of additional discovery, there's anything other than the EMA.

THE COURT: Okay.

MS. MAYHEW: Your Honor, finally turning to Section 502(e)(1)(B) the --

THE COURT: I'm sorry, one more thing. I mean, obviously the agreement in Safety Clean hadn't been terminated, right?

MS. MAYHEW: That is correct.

THE COURT: So really the question there was whether, in fact, they assumed it in the first place, whether there was an EMA. Here, everyone acknowledges that there was an EMA in effect that would have covered your clients, right?

MS. MAYHEW: And our position is, did cover our clients --

THE COURT: Right. Okay.

MS. MAYHEW: -- up until they alleged that in July of 2009 they terminate the agreement and then evaporate any responsibility or liability that they would have had magically disappears.

THE COURT: Okay. So isn't that different from the facts in Safety Clean?

MS. MAYHEW: They are not on all fours, that is correct, Your Honor. I could not find a case where there was an agreement where some -- a party, a buyer assumed a liability and then terminated it.

THE COURT: Okay. All right.

MS. MAYHEW: With respect to 502(e)(1)(B), the debtor does take the position that the claims are barred under that section, and ITW disputes that 502(e)(1)(B) will prohibit them from asserting their claim. A claim will only be disallowed under that section, if the debtors can prove three factors that the claim was for reimbursement or contribution, that the party asserting the claim is liable with the debtor to a third party, and that the claim is contingent.

The debtor cannot establish all three of these factors. In particular, the debtor's argument fails with respect to the second prong, because it's taking the position that it has no liability to the EPA under CERCLA, and therefore, it's not liable to ITW to the EPA.

So there can be no co-liability between ITW and the debtor if the debtor's position is that there is no CERCLA liability, and it is not on the hook for that.

THE COURT: Well, let me stop you there. So you're saying that because of the alternative liability under the EMA, these really aren't, at least that aspect of the claim, is not a contingent reimbursement or a contribution claim?

MS. MAYHEW: It's not contingent reimbursement. It is a direct claim that ITW is asserting, but in addition to that, it has to be dual liability on account of the same claim, and if the debtor's position is that they're not liable to EPA for a CERCLA claim then their --

THE COURT: I mean, they -- I don't understand. That doesn't -- I thought -- I accept your other argument, but that one, I mean, you could always plead in the alternative. You can always say, I'm not liable to Mr. X, I'm not liable to Mr. Y, but if I'm liable to both of them on the same claim, I only have to pay one, right.

MS. MAYHEW: True, but it does fall apart if they're not liable to CERCLA. They're not allowed to EPA under CERCLA, excuse me.

THE COURT: I agree that if they're liable under the EMA to you, they're not going to be liable to the EPA necessarily on that same basis.

MS. MAYHEW: Correct.

THE COURT: Okay.

MS. MAYHEW: And therefore, they're not double claims.

Finally, Your Honor, again, as evidenced in our latest submission, the claims for which ITW is seeking reimbursement for --

THE COURT: Right.

MS. MAYHEW: -- they're wholly separate and apart from the EPA's claims. There's not subjecting the debtor to any type of double recovery.

THE COURT: Right. And in any event, there wouldn't be double recovery.

MS. MAYHEW: Correct.

THE COURT: Even if they were on the same claims. Okay.

MS. MAYHEW: For those reasons, Your Honor, we would ask that the Court overrule the debtor's objections to our claims.

THE COURT: Okay.

MS. MAYHEW: Thank you.

THE COURT: Could you address Safety Clean first?

MR. BERLIN: Yes, Your Honor. I mean, I think you've got a fundamentally different situation where the agreement remains in effect going forward. I think it's exactly what you said, which was that in Safety Clean, the question really was, was there an EMA in the first place, because that's what the argument was about.

Here what happened is, the agreement was terminated, and you know, we've heard a lot of talk about harm and --

THE COURT: Well, can I interrupt you though?

MR. BERLIN: Please.

THE COURT: I think that Safety Clean was set up where someone fairly analogous to Delphi sought a declaration that they hadn't assumed a liability, right. But wasn't it implicit that or maybe it wasn't, you can tell me, that Judge Walsh at least thought that PRPs could be the third party beneficiaries of the agreement between the buyer and the seller?

MR. BERLIN: When you say PRPs could be the third

party beneficiaries?

THE COURT: Yeah. As opposed to -- well, it wasn't just -- I think it was set up in a way that maybe you can argue that the fight was really between parties analogous to you and GM and GM's creditors, saying that you know, GM is getting these claims against it, and GM wants to be able to assert liability under the purchase agreement against Delphi, I'm substituting the parties in Safety Clean, and therefore, it's not really a third party beneficiary case at all, it's a case between GM and Delphi.

But it seemed to me that maybe there was more to it than that, and it also recognized that in the context of a purchase agreement, where there was an allocation of future liability and assumption, that the third parties could be the intended beneficiaries of that agreement.

MR. BERLIN: Well, I think it's fairly common when you've got an indemnity type of agreement for the indemnitor to be the party that's ultimately brought into these cases, and people don't really challenge it on that ground --

THE COURT: Right.

MR. BERLIN: -- because they don't really benefit from challenging in that particular situation, so it doesn't really become an issue for them in the way you've described it. We've got a very different set of facts here, because we have now terminated that agreement, and the fact of the matter is, by

terminating that agreement from a CERCLA standpoint, there is no harm, and there's no avoidance of liability.

THE COURT: No, I understand that. But since the agreement was in effect when they filed their claim, wouldn't they be able to rely on it. If they were a beneficiary.

MR. BERLIN: Well, they had to be a third party beneficiary to rely on it.

THE COURT: Yeah.

MR. BERLIN: And again, I think the state law, if you look at it on that, it's very clear that they're not a third party beneficiary in this case. And, you know, again what they want in this case is to be able to go after two parties for the exact same liability, because they've always had the ability to go after General Motors.

You know, again as long as our agreement is in effect and they go after us, you know, General Motors is not really in the picture, but now that General Motors has taken back that risk, all we're really saying is, you go to the parties that now has the risk and took it over, you weren't a beneficiary to this agreement, you're not being harmed by the agreement being terminated, because you can go back to the party that's responsible under CERCLA to begin with, and they were always responsible under that. And we, as the third party, standing between them and General Motors is just now out of the picture.

THE COURT: Okay. And what about -- I know you

addressed this the first time, but I'd like to go back and have you address ITW's argument that this really does fit within at least Ohio's continuation of business doctrine since quote, you had the same owners and the same business.

MR. BERLIN: Well, there are a couple of things, Your Honor. First of all, we cite in addition to the Perko case, which we start off with, and which they rely on heavily, says that as a prerequisite for the case being brought, all or substantially all of the assets were acquired in a sham transaction, or there was a sham transaction.

Here, all of the assets weren't acquired.

THE COURT: Weren't?

MR. BERLIN: Were not acquired. All of the assets of General Motors clearly were not acquired in this case.

Then you have three other cases in Ohio, Travis, McGraw and Cytec which we cite, in which the courts say again, as a prerequisite --

THE COURT: There's this additional requirement.

MR. BERLIN: Yeah. You have to have had only one company left afterwards. The ownership becomes an issue in these cases, because what happens in some of these transactions, as I'm sure you've seen, is that people set them up to try and avoid liability, and you know, the -- you know, one of these cases, the main -- one of the main cases that was relied on here, the father transferred a stock to the son, and

they said there's the same ownership in that situation. That's why that became a critical issue, but there's a prerequisite in all of these cases that there be either all or substantially all the assets sold or only one company remaining at the end, or there'd be a sham transaction, which again, nobody's argued here is the case. This was obviously a real transaction.

THE COURT: So the fact that the companies each had the same shareholders --

MR. BERLIN: Oh, we would contest that, too, of course, Your Honor, because --

THE COURT: I understand. But that fact standing alone isn't enough because --

MR. BERLIN: Right.

THE COURT: -- there are two separate companies.

MR. BERLIN: Yeah, two separate companies. And the -- and you know, in Perko too, they had the same situation where they set up a trust to distribute the stock and that obviously would've taken some time to do also, but again, there is a prerequisite that there can't be two companies left, and I think Ohio was very, very clear on that.

THE COURT: Okay.

MR. BERLIN: Okay. Those are really the only points I wanted to make unless you have any additional questions.

THE COURT: Okay.

MR. BERLIN: Thank you very much, Your Honor.

THE COURT: Ma'am, can you show me the language in Safety Clean you're relying on? I just want to make sure I've looked at it one last time.

MS. MAYHEW: Yes, Your Honor. I don't have a pinpoint site. If you'd give me one moment.

THE COURT: I'm looking at language --

MS. MAYHEW: It's the last page of the opinion, Your Honor.

THE COURT: Right.

MS. MAYHEW: About five paragraphs before the conclusion, number 13.

THE COURT: Paragraph 13.

MS. MAYHEW: I'm sorry, it says number 13.

THE COURT: Yeah, number 13.

MS. MAYHEW: Yes.

THE COURT: Right.

MS. MAYHEW: I'm sorry, the --

MR. BERLIN: And I might point out, at the end of that paragraph, Your Honor --

THE COURT: Right. I was going to say the sale order --

MR. BERLIN: Expressly --

THE COURT: -- expressly conferred third party beneficiary rights.

MR. BERLIN: Right. And ours expressly does not. I

do think they relied on language in the sale order here.

THE COURT: I'm sorry?

MR. BERLIN: I do think the Court relied on -- significantly on language in the sale order here.

THE COURT: Yeah.

MS. MAYHEW: But I think it says irrespective of that, it would also find that there was --

THE COURT: All right. I'm going to take a couple of minutes. I want to look at the case that Judge Walsh relied on in that first sentence. I'll be right back.

(Recessed at 12:24 p.m.; reconvened at 12:44 p.m.)

THE COURT: Okay. We're back on the record in In Re: DPH Holdings Corporation, and in respect of the claims sufficiency hearing, in respect of the remaining claims for investigation and clean-up costs and related environmental liability claims of ITW and others related to the Dayton and Tremont sites.

I will refer to ITW throughout, the other claimants have sought to be included in the logic in the rationale of ITW's responses.

It is not in dispute that the Delphi debtors were formed as part of spin off or divestiture transaction by General Motors Company, GM, on September 16th, 1998.

The Dayton and Tremont sites, it is contended by the debtors were closed before the debtors came into existence as a

result of that spin-off transaction, and in fact, were closed in 1996. The claimants appear to accept that with regard to the Dayton -- I'm sorry, the Tremont site, but not the Dayton site. However, the claimants also acknowledge that they have asserted no facts, other than a recitation of the factors set forth in the applicable statutes are under common law for liability, that would show that the debtors were actually an owner operator of either site before the -- either site closed.

ITW asserts a claim against the debtors on two grounds. First, it asserts that it has a cause of action against the debtors under 42 USC 9601. It also asserts that it has a contribution cause of action under 42 USC 9613(f). Both of those sections of CERCLA require a finding of coverage or potential liability by the debtors under 42 USC Section 9607(a), which sets forth foregrounds for an entity to be covered under ERISA for liability; one, as an owner or operator of a facility; two, as to any person who at the time of disposal of any hazardous substance owned or operated any facility in which such hazardous substances were disposed of; three, any person who by contract, agreement, or otherwise, arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person by any other entity -- I'm sorry, by any other party or entity in any facility owned or operated by another party or entity

containing such hazardous substances; and four, any person who accepts or accepted hazardous substances for transport or to dispose or treatment facilities.

The second basis for the claim by ITW is based upon an agreement known as the environmental matters agreement entered into between Delphi Automotive Systems Corporation and GM in connection with the spin off as of October 1998, pursuant to which in Article 2, the parties allocated environmental liabilities as defined in the EMA between each other, and under Section 2.2, Delphi agreed to be solely responsible for all environmental damages arising from or relating to or in connection with all Delphi facilities and Delphi assets as defined in the agreement.

It's acknowledged by the Delphi debtors, now known as DPH Holdings, that the EMA would allocate as among GM and Delphi responsibility with respect to the defined environmental costs at the Dayton and Tremont facilities to Delphi.

ITW asserts that it is a beneficiary of this agreement, notwithstanding paragraph 9.1.6 of the agreement, which states that the -- it states, quote, no rights are created in any third party by this agreement.

The debtors contend first that they are not a covered person under CERCLA, and that includes their denial that they have liability under CERCLA as a result of the application of a de facto merger or mere continuation doctrine, that would make

them a successor to GM, because they contend that under any applicable law, there was no de facto merger in connection with the 1998 spin off, and the mere continuation doctrine would not apply to that spin off.

In addition, DPH Holdings contends that ITW is not an intended beneficiary or proper third party beneficiary of the environmental matters agreement, and that further, GM and Delphi agreed on notice to the parties in interest in this Chapter 11 case, to terminate the EMA in connection with their master disposition agreement, and the Chapter 11 plan that has been confirmed and consummated in this case.

This is, as I said, a sufficiency hearing. Therefore, the issues before the Court all relate to the facial sufficiency of ITW's claim. In that connection, the Court conducts the analysis of the claim in a manner similar to an analysis of a motion to dismiss under Rule 12(b)(6).

If the claimant survives the sufficiency hearing, then it may proceed to take additional discovery and prove up on a factual basis its claim.

With regard to the first aspect of the claim, I conclude that the claimant here has not satisfied, as far as the proof of claim is concerned, or the information submitted in connection with the objection, a key element of Federal Rule 8, that is, with regard to the allegation that the debtors may be liable as owner operators of the facilities before the

facilities were shutdown, and not on the other hand, is a successor, to such owner operators.

They have merely made a formulaic recitation of the elements of the CERCLA cause of action. They have not asserted any fact to support the contention that the Delphi debtors operated the facility or, in fact, dealt with at all the transport or disposal of hazardous substances at the facilities. And therefore, I believe that the complaint -- I'm sorry, the proof of claim is not sufficient on -- or to the extent that it asserts a claim on that ground. See Bell Atlantic Corp versus Twombly, 550 US 544-555, 2007, and Ashcroft versus Iqbal, 1291 Supreme Court 1937, 1951, 2009.

That still leaves, of course, whether in fact Delphi can be liable under CERCLA as a successor to GM which both sides acknowledge was, in fact, an owner operator for purposes of the statute. It's also undisputed that if under applicable law, Delphi is determined to be a successor to GM, it would have liability under CERCLA, see New York versus National Services Industries, Inc., 460 F3d 201, 206, Second Circuit, 2006.

The parties dispute which applicable law should apply to determine whether, in fact, Delphi is a successor to GM for purposes of CERCLA. Although they agree that the Court's determination of the applicable law should be decided under the law of New York. Although they also acknowledge that the

choice of law analysis is colored by an appreciation of the fact that CERCLA is a national statute, and that in fact, therefore, when one gets to the choice of law determination, in addition to the option of choosing an applicable state's law, the Court should also consider whether federal law would govern the successor liability issue.

I conclude that while it appears that the Court of Appeals in the National Service Industries' case did not clearly come down on the side of applying a non-federal law, that the choice available to the Court, the proper choice available to the Court is one between either the law of the state of incorporation of the entity, against whom successor liability is being asserted, and federal law.

I further conclude that I did not need to go further to decide whether the law of Delaware, the state of incorporation of Delphi, or federal law applies because the result on the successor liability issue would be the same under either law. This, in effect, was also the result of the National Services Industries' case, where the Court was mindful of the need to take into account fundamental or foreign book principles of applicable state law on the underlying merits, and found that those principles did not conflict with in that case, as they don't here, the principles of federal law.

I have reached the conclusion that the choice is between Delaware law, the state of incorporation of Delphi and

federal law because it is clear under New York law, New York choice of law principles that with respect to issues of successor liability, the state having the greatest interest in the litigation, which is a litigation here with the purpose of determining whether successor liability should apply, is the law of the state of incorporation of that corporate entity, which clearly has an extremely strong interest in prescribing the circumstances under which the limitation on liability for separate corporations incorporated under its laws will be disregarded.

See for example, Kalb Voorhis and Company versus American Financial Corp., 8 F3d 130, 132, Second Circuit 1993 and Soviet Pan Am Travel Effort versus Travel Committee, Inc., 756 F.Supp 126, SDNY 1991. See also, Sophie Classic SA Dis a Vey versus Horowitz (ph), 444 F.Supp 2d 321, 240 SDNY 2006.

I note that ITW has relied upon an Ohio case to contend that I should focus on the site of the injury in my choice of law determination, but in that case, the site of the injury was also the state of incorporation of the entity against which successor liability was sought. That case is Cytec Industries, Inc. versus B.F. Goodrich Company, 196 F.Supp 2d, 644, SD Ohio 2002.

So I do not believe that even were I to be bound by such a case or believe it was a proper analysis under New York choice of law principles, it would be relevant here.

The claimant has not conceded expressly that under either Delaware law or federal common law relating to successor liability, it would not have a valid successor liability claim against Delphi; however, it is not cited any authority for the proposition that it would have such a claim under either of those two potentially applicable laws. And to the contrary, the debtors have cited sufficient law in both context to support their contention that certain undisputed facts preclude the debtors from being viewed in this context as successors under a de facto merger transaction or other successor liability.

The general rule, of course, is that a corporation that purchases or receives the assets of another corporation is not liable for the seller's liabilities. See U.S. versus General Battery Corp., 423 F3d 294, 305, Third Circuit, 2005.

However, there are certain exceptions to that doctrine or that general rule, recognized by both Delaware and under federal common law in those jurisdictions that have applied federal common law.

Under Delaware law, a de facto merger occurs notwithstanding the documentation of the transaction, where one corporation transfers all of its assets to another corporation to payment is made in stock, including by the transferee directly to the shareholders of the transferring corporation, and through an exchange for their stock in that corporation,

the transferee agreeing to assume all the debts and liabilities of the transferor, or finally where there's fraud in the transaction designed to evade legitimate creditor claims.

It is not entirely clear whether each of these factors must be shown, since the primary purpose of the doctrine is to recognize what, in fact, should be viewed as a merger, notwithstanding the documentation of the transaction.

But nevertheless, the fact that GM survived the spin off, and in fact, survived as at that time, an extremely viable company would, under Delaware law, preclude the application of the de facto merger doctrine here. See Xperex Corp, X-p-e-r-e-x, versus Via Systems Technologies Corp, 2004 Delaware Chancellery, LEXIS 172, Court of Chancellery, Delaware July 22, 2004.

The same fact also would preclude successor liability under general federal law where the de facto merger doctrine requires one, a continuation of the enterprise of the seller corporation, so that there's a continuity of management personnel, physical location, assets, and general business operations, there's a continuity of shareholders, which results from the purchasing corporation paying for the acquired assets with shares of its own stock. This stock ultimately coming to be held by the shareholders of the seller corporation, so that they become a constituent part of the purchasing corporation.

Three, the seller corporation ceases its ordinary

business operations, liquidates and dissolves as soon as legally and practically possible. And four, the purchasing corporation assumes those obligations of the seller, ordinarily necessary for the uninterrupted continuation of the normal business operations of the seller.

See United States versus General Battery Corporation, Inc., 423 F3d 294, Third Circuit, 2005. See also the general Hornbook factors set forth in New York versus National Service Industries, Inc., 460 F3d 201, which includes the fundamental notion of cessation of ordinary business and dissolution of the acquired corporation as soon as possible.

Again, under the acknowledged facts of this dispute, that factor cannot be shown by the claimants.

While I have concluded that the only proper choice of law here is either Delaware law, the state of incorporation of Delphi, or general federal common law on successor liability, I note alternatively that it appears to me on a sufficiency hearing basis, that ITW cannot establish successor liability under its asserted proper law, which would be the law of Ohio.

I say this with regard to the de facto merger doctrine under Ohio law, for the same reason that I've so concluded with respect to Delaware and federal law. That is because under Ohio's de facto merger doctrine, quote, the de facto merger doctrine presupposes that the predecessor corporation no longer exists, close quote, and that a de facto merger is a

transaction that results in the dissolution of the predecessor corporation and is in the nature of a total absorption of the previous business into the successor. Welco Industries, Inc. versus Applied Companies, 617 NE2d 1129, Ohio Supreme, 1993.

This fundamental proposition, in addition to being fundamental as Judge Sotomayor noted in the State of New York case that I've cited is one that runs through all of the Ohio cases, that the parties have cited to me and that I have reviewed. See McGill versus South Bend Lathe, Inc. (ph), 598 NE2d 18, Ohio app. 1991; Erdy versus Columbus Paraprofessional Institute, 599 NE2d 338, Ohio app. 1991; TexLaw Incorporation versus Smart Media of Delaware, 2005 Ohio app. LEXIS 4475, September 21, 2005.

The claimant asserts that the foregoing principle is just one of several factors, in fact, four factors, cited by the Ohio courts, and that it has been held that Ohio law does not require all four factors to be found for there to be a de facto merger, citing Cytec, C-y-t-e-c, Industries, Inc. versus B.F. Goodrich Company, 196 F.Supp 2d at 658.

However, that case concerned a different and traditionally less important factor in the de facto merger doctrine than the factor of the dissolution, as soon as practicable of the transferring or selling entity. In fact, in the Cytec case, it was clear that the transferring entity had dissolved and liquidated at the same time that the defendant

acquired all of the assets. Thus leaving the creditors of that entity holding the bag, unless they could assert successor liability against the defendant.

I do not believe that the district court in the Cytec case meant to overturn the fundamental requirement that the plaintiffs -- the claimant here simply will not be able to show, which is that the transferring entity in one way or the other promptly ceased to exist.

That fact also, I believe, means that the claimant will not be able to assert successor liability on the alternative ground under Ohio law of mere continuation as the Court in Erdy versus Columbus Paraprofessional Institute, 599 NE2d 338 stated at 341, the basis of continuity theory lies in the continuation of the corporate entity, not merely the continuation of the business operation. In this sense, the business operation did continue -- I'm sorry, leave it at that.

Here notwithstanding a continuity of ownership and management for a period following the transfer, GM continued as a business operation separately from the spun off division, and consequently, I believe that the mere continuation doctrine, based on that undisputable fact, will not lie here.

With regard to the second basis for or actually the third basis for the claimant's claim in this case, the claimant relies upon the EMA. It appears to me that notwithstanding the termination of the EMA by the parties, that if in fact during

the effectiveness of it, the claimant was a beneficiary of the agreement, it would have a claim against Delphi.

The claim would not be one under CERCLA but instead would be one under applicable third party beneficiary law, which here, I believe, would be the law again of Delaware given both the state of incorporation, as well as the choice of law by the parties.

The most important or one of the most important points to keep in mind in connection with this issue is that Delphi's argument does not result in a clearly potentially responsible party, GM shirking its obligations under CERCLA, pursuant to a private agreement between GM and Delphi. Rather, the question is whether in light of Delphi's entry into the EMA and its effectiveness during the period that the claim is asserted and the liability was alleged to have been incurred, the claimant is a beneficiary of that agreement.

Under Delaware law, quote, to qualify as a third party beneficiary of the contract, one, the contracting parties must have intended that the third party beneficiary benefit from the contract; two, the benefit must have been intended as a gift during satisfaction of a pre-existing obligation to that person; and three, the intent to benefit the third party must be a material part of the party's purpose of entering into the contract. Madison Realty Partners 7 LLC versus AgIsa LLC (ph), 2001 WL 406 268 at page 5, Delaware Chancellery April 7, 2001,

citing Guardian Construction Company versus Tritech Bridges and Inc., 5838 2d 378, 1386-87, Delaware Superior Court, 1990.

Here, of course, no PRPs were named as intended beneficiaries, and in fact, the parties in Section 9.16 specified their intention not to render their agreement something that any third party could enforce or seek the benefit of.

In addition, at the time that Delphi entered into the agreement, it had no pre-existing obligation to any PRP including the claimant here and there's no suggestion that it intended gratuitously to benefit them.

In addition, it appears to me that the intention of the parties was to allocate liabilities as between themselves, that is particularly the case since GM would, as I said earlier, always have potential liability under CERCLA for the facilities that it had previously operated, even if the environmental condition was not discovered until after the date of the allocation over by the parties to Delphi.

In addition, and in this sense, the modification -- I'm sorry, the termination of the parties' rights under the agreement is important. The MDA pursuant to which the EMA was terminated was on notice to the parties in interest in this case, as part of the confirmation of Delphi's plan. And this aspect of the MDA was not opposed. The termination of the MDA -- I'm sorry, of the EMA, pursuant to the master disposition

agreement reflected a settlement as between -- a global settlement, as between GM and Delphi.

In response to those contentions, all of which I find to be meritorious, the claimant ITW has cited In Re: Safety Clean Corporation, 380 BR 716, a Bankruptcy D. Delaware of 2008 for the proposition that -- and this is a quote from the opinion, when a buyer expressly assumes liabilities of a seller, it becomes directly liable therefore, regardless of any language in the sale agreement, otherwise purporting generally to disclaim third party beneficiary rights, close quote. That appears at page 739 of the decision.

I have reviewed the authorities relied upon by the Court in that case, and frankly, did not find support for the proposition in them. Rosener, R-o-s-e-n-e-r, versus Majestic Management, 321 BR 128, Bankruptcy D. Delaware 2005, does not really deal with third party beneficiary law, but instead discusses general exceptions to the limited liability of corporations and cites the general rule setting forth the factors under which a corporation may have successor liability, including its assumption expressly of liability.

It cites, as does in the preceding paragraph, the Safety Clean case, Brzozowski versus Corresponding Physicians Services, Inc., 360 F3d 173, 177, Third Circuit, 2004, which also stands for that proposition and involved a dispute between the seller and the purchaser, not between the purchaser and

perspective or possible third party beneficiaries.

I also note that the remark that I quoted in the Safety Clean case, may be viewed as dicta because the Court then goes on to state quote, moreover, the sale order expressly conferred third party beneficiary rights on interested parties, including the creditors of Safety Clean. The order approving the MDA in the settlement thereof, did not confer third party beneficiary rights on potentially responsible parties here.

So in light of that and my conclusion that Delphi and GM did not have as a material part of their purpose in entering into the environmental matters agreement, to benefit other potentially responsible parties, for example, even if as is the case here, Delphi and GM resolved all of their issues and determined to cancel the EMA, that ITW and other potentially responsible parties are not third party beneficiaries of that agreement.

Consequently, Delphi's objection should be granted and Delphi should submit an order consistent with my ruling.

MR. LYONS: Thank you, Your Honor, we will.

One other matter, Your Honor, that's not on the agenda, the DPH is in the process of resolving a number of avoidance actions, and in connection once an avoidance action has been resolved, there is a resulting claim under 502(h).

THE COURT: Right.

MR. LYONS: So, Your Honor, what we -- you will see a

lot of stipulations coming your way which will grant an allowed claim under subject -- pursuant to 502(d) --

THE COURT: Right.

MR. LYONS: -- or 502(h), however, we want to keep the amounts confidential, so the orders themselves would just be generic, they would say they'd have an allowed claim pursuant to the terms of the agreement and pursuant to 502(h).

So again, the stipulations and which would result in --

THE COURT: If it references the stipulation, I don't have any problem with that.

MR. LYONS: Very good.

THE COURT: Just so that someone can see the order and match it up with a stipulation in the future.

MR. LYONS: Right. And it would just say that there's a claim that's been allowed, it would not have the amount of the claim, because again, the amount of the claim --

THE COURT: No. But there's a stipulation that does have the amount of the claim in it, and I want to be able to make sure that anyone administering the claims would know what to pay out.

MR. LYONS: Yes.

THE COURT: In reference to an actual agreement that's referenced in the order.

MR. LYONS: Yes. And the amount again would be

confidential. It would not be --

THE COURT: But the amount of stipulation will -- has to be. You don't have to attach the stipulation, but there's a stipulation that --

MR. LYONS: Governs the rights of the parties.

THE COURT: It's going to be in the records of both sides.

MR. LYONS: Correct, exactly. It's just that --

THE COURT: And I'm not going to sign an order that says that's confidential, that stipulation. I'm assuming you're not asking me for that.

MR. LYONS: For the stipulation being confidential?

THE COURT: Right.

MR. LYONS: Well, the stipulation would not be publicly filed.

THE COURT: Right. But that's a different thing.

MR. LYONS: So the order would be -- very good. And then when that matches up to the claim number in the system, the claims register, the amount similarly would not be publicly available, it would just reference the stipulation.

THE COURT: And your -- and the order will say that it's allowed once they pay, right?

MR. LYONS: Yes. Once they pay the settlement amount, correct.

THE COURT: Okay.

MR. LYONS: Okay. That's all, Your Honor. I don't have anything further.

THE COURT: Okay.

MR. LYONS: Thank you very much.

THE COURT: So you all can be excused. Thank you.

MR. LYONS: Thank you, Your Honor.

MR. BERLIN: Thank you, Your Honor.

MS. MAYHEW: Thank you, Your Honor.

THE COURT: Okay.

(Proceedings concluded at 1:41 p.m.)

* * * * *

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sara Davis, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sara Davis

Digitally signed by Sara Davis
DN: cn=Sara Davis, o, ou, email=digital1@veritext.com, c=US
Date: 2010.09.27 15:55:27 -04'00'

_____

SARA DAVIS

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: September 27, 2010